IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

GARSIL LAVELL BROWN,

Petitioner,

vs.

BOBBY BOONE,

Respondent.

No. 93-C-732-B

ORDER

On December 23, 1994, the Court granted Petitioner an opportunity to dismiss voluntarily his petition for a writ of habeas corpus as moot or to submit arguments in support of his claim, if any, that the appellate delay in his direct criminal appeal violated his due process and/or equal protection rights. See Harris v. Champion, 15 F.3d 1538, 1558-1568 (10th Cir. 1994) (Harris II). On January 9, 1995, Petitioner filed his brief in support of his appellate delay claims. He alleged that he was entitled to a writ of habeas corpus on the following grounds:

> Petitioner states that his ruling was prejudice because the courtt [sic] of Appeals dismissed one of his c hagres [sic] but if they was [sic] not rushed int o [sic] a decision by the Harris Rule, then the results would Have [sic] been different, and the court could have granted a retrial and Petitioner was prejudiced by the unequal decision rendered.

(Response, doc. #18, at 2.) Respondent replies that the ruling of the Oklahoma Court of Criminal Appeals--affirming Petitioner's two rape convictions, his sodomy conviction, and his burglary conviction, and reversing with instructions to dismiss Petitioner's assault and battery conviction--has mooted the delay issue in this

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habeas action.

The Tenth Circuit Court of Appeals has made clear that if a petitioner's conviction has been affirmed, as in this case, federal habeas corpus relief on the basis of inordinate delay alone is not an available remedy unless the petitioner shows "actual prejudice to the appeal, itself, arising from the delay." Harris II, 15 F.3d at 1566. The Circuit, quoting from Diaz v. Henderson, 905 F.2d 652, 653 (2nd Cir. 1990), reasoned as follows:

> An untainted affirmance of a petitioner's state appeal while his habeas petition is pending makes clear that the petitioner was confined pursuant to a valid judgment of conviction throughout the period of delay. The affirmance established that if the delay had not occurred and petitioner's due process right to a timely appeal had been fully satisfied, he would have been subject to exactly the same term of confinement. Because the due process violation did not result in an illegal confinement, it cannot justify granting the habeas remedy of unconditional release.

Harris II, 15 F.3d at 1566 (10th Cir. 1994).

The Tenth Circuit Court of Appeals has also made clear that "a petitioner whose conviction the state court has reversed with prejudice to retrial is not entitled to federal habeas relief . . . [b]ecause the state court has set such a petitioner's release in motion." Id.

The Court finds the above reasoning applicable to the case at hand although Petitioner was represented on direct appeal by the Tulsa County Public Defender's Office instead of the Oklahoma Indigent Defense System. See Taylor v. Steve Hargett, 27 F.3d 483 (10th Cir. 1994) (applying the Harris II standard although petitioner was represented by retained counsel on direct appeal); see also Strickland v. Keothane, CIV-92-197-A (W. Dist. Okla. Apr.

19, 1994).

After carefully reviewing Petitioner's response, the Court concludes that Petitioner has not established that, but for the appellate delay, his appeal would have been decided differently. See Harris II, 13 F.3d at 1566 (citing Mwwakkil v. Hoke, 968 F.2d 284, 285 (2d Cir.), cert. denied, 113 S.Ct. 664 (1992)). Accordingly, Petitioner's petition for a writ of habeas corpus on the basis of appellate delay should be denied. The Court holds, however, that this denial is without prejudice to Petitioner filing of a separate pro se action to pursue any other non-delay constitutional claims that he might have with regard to his conviction in CF-91-2809. But see Harris v. Champion, 48 F.3d 1127, 1131 (10th Cir. 1995).

ACCORDINGLY, IT IS HEREBY ORDERED that Petitioner's petition for a writ of habeas corpus is **denied**. (Docket #1 and #18.)

SO ORDERED THIS 9th day of May, 1995.

THOMAS R. BRETT, Chief Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DELMA STAFFORD,

Plaintiff,

vs.

ALERT CABLE TV OF OKLAHOMA, INC., d/b/a CABLEVISION INDUSTRIES CORPORATION,

Defendant.

Case No. 94-C-552-K

STIPULATION FOR DISMISSAL WITH PREJUDICE

The parties have settled the captioned matter and hereby request that this Court enter the attached Order of Dismissal With Prejudice.

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Attorneys For Defendants,
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Cablevision Industries of the Southeast,
Inc.

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

JESS FOSTER,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 94-C-388-K**
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	
	)	

STIPULATION OF DISMISSAL

The plaintiff, Jess Foster, by his attorney of record, Thomas E. Baker, and the defendant, United States of America, acting on behalf of the United States Department of Veterans Affairs, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Peter Bernhardt, Assistant United States Attorney, having fully settled all claims asserted by the plaintiff in this litigation, hereby stipulate to, and request entry by the Court of, the order submitted herewith dismissing all such claims with prejudice.

Dated this 22nd day of March 1995.

for **PETER BERNHARDT, OBA #741**
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Attorney for Plaintiff

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

BARBARA LYNN BELL,

Petitioner,

vs.

NEVILLE MASSIE, Warden of the Mabel Bassett Correctional Center, and DREW EDMONDSON, Attorney General of the State of Oklahoma,

Respondents.

No. 95-C-169-H

ORDER

This matter comes before the Court on the Motion to Dismiss for Failure to Exhaust State Remedies (docket #5) of Respondents Neville Massie and Drew Edmondson, and the Request for Hearing (docket #7) of Petitioner Barbara Lynn Bell.

Petitioner, an inmate at the Mabel Bassett Correctional Center, brings this petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, challenging her 1993 conviction in Tulsa County District Court for murder in the second degree on the ground that she has been deprived of a complete and accurate record of her trial. Petitioner presently has a direct appeal pending in the Accelerated Docket of the Oklahoma Court of Criminal Appeals, challenging the modified version of OUJI-CR [Oklahoma Uniform Jury Instructions-Criminal] Nos. 903 and 109.

Respondents have moved to dismiss this petition for failure to exhaust state court remedies on the basis that Petitioner's direct criminal appeal is presently pending. Respondents concede that the

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Court of Criminal Appeals has ruled adversely to Petitioner on the narrow issue of whether the trial transcripts are complete and whether they reasonably and accurately reflect the trial proceedings. Nevertheless, Respondents cite Sherwood v. Tompkins, 716 F.2d 632, 634 (9th Cir. 1983), for the proposition that "[w]hen . . . an appeal of a state criminal conviction is pending, a would-be habeas corpus petitioner must await the outcome of his appeal before his state remedies are exhausted, even where the issue to be challenged in the writ of habeas corpus has been finally settled in the state courts." See also Stanley v. California Supreme Court, 21 F.3d 359, 360 (9th Cir. 1994). The reason for such a rule is that "even if the federal constitutional question raised by the habeas corpus petitioner cannot be resolved in a pending state appeal, that appeal may result in the reversal of the petitioner's conviction on some other ground, thereby mooting the federal question." Sherwood, 716 F.2d at 634 (citing Davidson v. Klinger, 411 F.2d 746, 747 (9th Cir. 1969)).

In opposition to the motion to dismiss, Petitioner argues that the exhaustion doctrine only requires a state prisoner to exhaust the remedies available at the state level with respect to the specific claim which he or she presents in a federal habeas petition.[1] This Court agrees. To exhaust a claim, an Oklahoma

[1]Petitioner further notes that "[t]he Sherwood court's comments on the impact of petitioner's pending state appeal were dicta, and made only after the court determined that the petition should be dismissed based on petitioner's failure to exhaust his state remedies with respect to the specific issue presented in this habeas corpus petition."

prisoner must have "fairly presented" the specific claim which he or she is seeking to raise in a federal habeas petition to the Oklahoma Court of Criminal Appeals. See Picard v. Conner, 404 U.S. 270, 275-76 (1971).

The exhaustion doctrine is "a judicially crafted instrument which reflects a careful balance between important interests of federalism and the need to preserve the writ of habeas corpus as a 'swift and imperative remedy in all cases of illegal restraint or confinement.'" Braden v. 30th Judicial Cir. Ct. of Kentucky, 410 U.S. 484, 490 (1973) (quoted case omitted). "Although the doctrine advances several interests, it 'is principally designed to protect the state court's role in the enforcement of federal law and prevent disruption of state judicial proceedings.'" Harris v. Champion, 15 F.3d 1538, 1554 (10th Cir. 1994) (quoting Rose v. Lundy, 455 U.S. 509, 518 (1982)).

> Because "it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation, federal courts apply the doctrine of comity, which "teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter."

Rose, 455 U.S. at 518.

The Tenth Circuit Court of Appeals has long held that a petitioner who has pending in state court a direct appeal from his conviction has not exhausted state remedies and therefore is not entitled to proceed by federal habeas corpus. See Parkhurst v. State of Wyoming, 641 F.2d 775, 776 (10th Cir. 1981) (per curiam).

The Tenth Circuit, however, has limited this holding to cases where the claims raised in the federal habeas petitions were part of the several issues raised on the state appeals, and therefore, the state court's role in the enforcement of federal law was not preserved. See Parkhurst, 641 F.2d at 776; Denney v. State of Kansas, 436 F.2d 587 (10th Cir. 1971) (per curiam); Daegele v. Crouse, 429 F.2d 503 (10th Cir. 1970) (per curiam), cert. denied, 400 U.S. 1010 (1971); Kessinger v. Page, 369 F.2d 799 (10th Cir. 1966) (per curiam); Lee v. State of Kansas, 346 F.2d 48 (10th Cir. 1965) (per curiam). See also Gowler v. Arnold, 462 F. Supp. 427, 428 (W.D. Okla. 1977).

Unlike the above cited cases, comity has been satisfied in the case at hand. Even though Petitioner's direct appeal is currently pending, Petitioner has presented her claim of the incomplete trial record to the Oklahoma state courts and those courts have had the first opportunity to develop the record on that issue and determine the specific claim of constitutional error which is presented to this Court on the petition for a writ of habeas corpus. As noted above, Respondents do not dispute that all issues relating to the legal consequences of the incomplete trial record have been determined by the Oklahoma Court of Criminal Appeals.

The Court concludes that the fact that Petitioner's appeal may result in the reversal of her conviction on other grounds, and therefore moot the instant petition, does not present a sufficient reason to delay Petitioner's principal interest in this action: obtaining speedy federal habeas relief. See Rose, 455 U.S. at 520

(citing Braden, 410 U.S. at 490). Because the "important interests of federalism" have been safeguarded in this case and because it is necessary "to preserve the writ of habeas corpus as a 'swift and imperative remedy in all cases of illegal restraint or confinement,'" Harris v. Champion, 15 F.3d at 1554 (quoting Braden, 410 U.S. at 490), this Court concludes that Respondents' motion to dismiss for failure to exhaust state remedies should be denied.

CONCLUSION

The Motion to Dismiss for Failure to Exhaust State Remedies (docket #5) of Respondents Neville Massie and Drew Edmondson is hereby **denied**. Respondents shall **file** a brief addressing the merits of Petitioner's habeas corpus claims on or before fifteen (15) days from the date of entry of this order. Petitioner shall **file** a reply brief within fifteen (15) days thereafter.

The Request for Hearing (docket #7) of Petitioner Barbara Lynn Bell is hereby **denied**. Petitioner may, however, reurge her motion following the filing of her reply brief.

Respondent Drew Edmondson, Attorney General for the State of Oklahoma, is hereby **dismissed** sua sponte as a party in this case since Petitioner is currently in custody pursuant to the state judgment in question. See Rule 2(a) and (b) of the Rules Governing

Section 2254 Cases.

IT IS SO ORDERED.

This 8TH day of MAY, 1995.

Sven Erik Holmes
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

UV CORP., a Delaware corporation,	)	
Plaintiff,	)	
vs.	)	Case No. 94-C-840-H
PHIL G. RUFFIN, an individual,	)	
Defendant.	)	

JOINT STIPULATION OF DISMISSAL
AND LIMITED RETENTION OF JURISDICTION

Pursuant to Rule 41(a) of the Federal Rules of Civil Procedure, the plaintiff, UV Corp., and the defendant, Phil G. Ruffin, jointly stipulate and agree that this action should be and is hereby dismissed with prejudice, in accordance with that certain Settlement Agreement executed by the parties on the 27th day of April, 1995. Plaintiff and defendant shall each bear its or his own costs, attorneys' fees, and expenses.

Pursuant to the express order of Magistrate Judge John Leo Wagner, and as stated in paragraph 6 of the Settlement Agreement referred to and incorporated herein, this Court shall retain jurisdiction over the parties hereto and the matters which are the subject of the Settlement Agreement for the sole purpose of enforcing the terms of the Settlement Agreement.

SVEN ERIK HOLMES, JUDGE
UNITED STATES DISTRICT COURT

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

BOBBY HUNTER,

Plaintiff,

vs.

TERESA L. MCCOIN,

Defendant.

No. 94-C-1194-B

ORDER

Before the Court is Defendant's motion to dismiss, filed on March 14, 1995. (Docket #4.) Plaintiff, a pro se litigant, has not responded.

Plaintiff's failure to respond to Defendant's motion constitutes a waiver of objection to the motion, and a confession of the matters raised by the motion. See Local Rule 7.1.C.[1]

ACCORDINGLY, IT IS HEREBY ORDERED that:

(1) Defendant's motion to dismiss or for summary judgment (docket #4) is **granted** and the above captioned case is **dismissed without prejudice** at this time.

(2) The Court will **reinstate** this action if Plaintiff submits a response to Defendant's motion to dismiss, or in the alternative for summary judgment, no later than ten (10) days from the date of entry of this order. See Miller v.

[1]Local Rule 7.1.C reads as follows:

Response Briefs. Response briefs shall be filed within fifteen (15) days after the filing of the motion. Failure to timely respond will authorize the court, in its discretion, to deem the matter confessed, and enter the relief requested.

Department of the Treasury, 934 F.2d 1161 (10th Cir. 1991), cert. denied, 112 S. Ct. 1215 (1992); Hancock v. City of Oklahoma City, 857 F.2d 1394 (10th Cir. 1988); Meade v. Grubbs, 841 F.2d 1512 (10th Cir. 1988).

SO ORDERED THIS 5 day of May, 1995.

THOMAS R. BRETT, Chief Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

DOUG W. GLASS,

Plaintiff,

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES, Donna Shalala, Secretary,

Defendant.

94-C-0200-B

ORDER

Plaintiff Doug Glass seeks judicial review of a decision by the Secretary of Health and Human Services.[1] The Secretary's decision denied Social Security disability benefits to the 30-year-old Glass, concluding that he could return to work as a meter reader, security guard and dispatch clerk. The Court **affirms** the Secretary's decision.

Glass was born in 1963 and has a 12th grade education. He last worked on an assembly line and as a laborer. He also has significant work experience as a welder. Glass says he has been unable to work since October 2, 1991 because of problems with his back, pain in his back and legs, and muscle spasms.

According to his brief, Glass' health problems surfaced in 1988 after injuring his back during a fall. He subsequently had a disc removed and then had to undergo a lumbar disketomy and a fusion. Then, in January of 1992, Glass underwent a third surgery for

[1] *In examining whether the Secretary erred, this Court's review is limited in scope by 42 U.S.C. § 405(g). Section 405(g) reads, in part: "Any individual, after the final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow...the findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive."*

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disketomy and fusion of L4/5 and L5/S1. *Plaintiff's Brief, pages 1-2 (docket #5).*[2]

After examining the evidence and listening to testimony from Glass and the Vocational Expert, the ALJ found, at step 4[3], that Glass could not return to his past relevant work as a laborer or welder. However, the ALJ, at step 5, concluded that Glass could work in the following jobs: meter reader, security guard and dispatch clerk. Since Glass could work, the ALJ found him to not be disabled.

Glass challenges that decision, raising two issues. The first is whether the Administrative Law Judge ("ALJ") properly analyzed his complaints of pain. The second issue is whether substantial evidence supports the Secretary's decision to deny disability benefits. Each is discussed below.

The rule on evaluating complaints of pain is examined in *Luna v. Bowen*.[4] First, the ALJ must determine whether a claimant has established a pain-producing impairment by objective medical evidence. The ALJ must then decide whether there is a "loose nexus" between the impairment and a claimant's subjective allegations of pain. If those two prongs are met, the question becomes whether, considering all the subjective and objective evidence, a claimant's pain is in fact disabling. *Id. at 163-164.*

In the instant case, the ALJ found that Glass, who has had multiple back surgeries, had pain in his back and legs. The ALJ also found a loose nexus between the back

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[2] *Medical evidence concerning these surgeries is discussed in the ALJ's opinion, Defendant's brief and in the record.*

[3] *A claim for benefits under the Social Security Act requires a five-step evaluation: (1) whether the claimant is currently working; (2) whether the claimant has a severe impairment; (3) whether the claimant's impairment meets an impairment listed in appendix 1 of the relevant regulation; (4) whether the impairment precludes the claimant from doing his past relevant work; and (5) whether the impairment precludes the claimant from doing any work. 20 C.F.R. § 404.1520(b)-(f) (1991). Once the Secretary finds the claimant either disabled or nondisabled at any step, the review ends. Gossett v. Bowen, 862 F.2d 802, 805 (10th Cir. 1988).* to work.

[4] *834 F.2d 161 (10th Cir. 1987).*

impairment and Plaintiff's subjective allegations of pain. Yet, the ALJ - after examining all the subjective and objective evidence - concluded that Glass's pain was **not** disabling. *Record at 21-25.* Consequently, the ALJ did not err in how he analyzed Glass's pain.[5]

The next question is whether substantial evidence supports the ALJ's finding that Glass was not disabled. Substantial evidence is what "a reasonable mind might deem adequate to support a conclusion." *Jordan v. Heckler,* 835 F.2d 1314, 1316 (10th Cir. 1987).[6] A finding of "no substantial evidence" is where a conspicuous absence of credible choices or no contrary medical evidence exists. *Trimiar v. Sullivan*, 966 F.2d 1326 (10th Cir. 1992).

The medical evidence consists of reports from the Washington Regional Medical Center and from Dr. Cyril A. Raben. *Record at 131-189.* The reports clearly indicate that Glass had three surgeries on his back and that he suffered from pain as a result of his back problems. However, none of the doctors examining Glass concluded that he was disabled or could no longer work. In fact, the reports suggest that Glass could maneuver well enough to perform work-related activities.

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[5] *In Luna, the Tenth Circuit set forth the factors to determine a claimant's credibility regarding subjective complaints of pain as (1) a claimant's persistent attempts to find relief for his pain and his willingness to try any treatment prescribed; (2) regular use of crutches or a cane; (3) regular contact with a doctor; (4) possibility that psychological disorders combine with physical problems; (5) claimant's daily activities; and (6) dosage, effectiveness and side effects of medication. These factors, however, are not an exhaustive list. Id. at 165. On pages 21-24 of the Record, the ALJ analyzed many of these factors and properly determined that Glass's pain was not disabling.*

[6] *One treatise summarized what is considered evidence in a disability case: "Evidence may consist of, but is not limited to, objective medical evidence such as medical signs and laboratory findings; other medical evidence such as medical history, opinions, and statements concerning treatment received by the claimant; statements made by the claimant or others concerning the claimant's impairments, restrictions, daily activities, efforts to work, or any other relevant statements made to medical sources during the course of examination or treatment, or to the SSA [Secretary] during interviews, on applications, in letters or in testimony; medical evidence from other sources; decisions by any agency, governmental or otherwise, about whether the claimant is disabled or blind; and, at the administrative law judge and Appeals Council level of determination, findings made by nonexamining medical or psychological consultants or nonexamining physicians or psychologists. In addition, the SSA may consider opinions expressed by medical experts based on their review of the claimant's case record. Social Security Law and Practice, §37.1 (1993).*

For example, following his third surgery, Dr. Anthony Raben stated that the surgery went well and he anticipated no problems with Glass. Dr. Raben, a treating physician, noted that he believed Glass should be walking up to two miles per day in a matter of weeks. *Record at 132.* Also, in March of 1992, Dr. Cyril Raben wrote "he **[Glass] is doing fantastic. I am very pleased with his progress. He is taking very little pain medication and his pain is markedly decreased. He is slowly increasing his strength. He is doing excellent."** *Record at 180.*[7]

In addition to the medical evidence, the Vocational Expert's testimony supports the ALJ's decision. In response to a hypothetical by the ALJ, the expert testified that a person with Glass's limitations could work as a meter reader, a security guard or a dispatcher/clerk. *Record at 77.*

Glass testified that he stopped work in October of 1991 because his back kept hurting. He testified that he helps take care of his two children and that his hobbies include tinkering with fishing rods and building bows. He also testified that he liked doing taxidermy work in his spare time. *Record at 47-57.*

When asked why he can no longer work, Glass testified that his back, legs and left arm "hurt all the time." *Id. at 58.* He says he has a "burning, aching" pain that never goes away. *Id. at 60.* He also testified that he could only stand, sit or walk up to 10 minutes each and that he uses a back brace "off and on." *Id. at 65.*

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[7] *The Record also includes evidence that Glass does suffer from pain. Dr. Cyril Raben noted in September 1, 1992 that Glass had "persistent, continual" lower left extremity pain. Record at 174. The same doctor gave a similar opinion on August 11, 1992. He recommended a "work hardening" program for Glass in July of 1992 because of a "marked deconditioning of his lumbar spine." Record at 177. It is clear that Glass suffers from pain, but the Court agrees with the ALJ that the evidence does not show disabling pain. See Talley v. Sullivan, 908 F.2d 585, 586-587 (10th Cir. 1990)(To be disabling, pain must be so severe, by itself or in conjunction with other impairments, as to preclude any substantial gainful activity.)*

A review of the evidence indicates that substantial evidence supports the Secretary's determination that Glass can return to work. The court accepts the fact that Glass suffers from pain in his back and legs, but substantial evidence -- including the medical records and the Vocational Expert testimony -- shows that he is not disabled. Glass obviously would have preferred the ALJ placed more weight on his testimony, but that, in itself, is not a reason to overturn the Secretary's decision, when, as here, there is medical evidence from claimant's treating physician which indicates claimant can work. *See, Diaz v. Secretary*, 898 F.2d 774, 777 (10th Cir. 1989)(Credibility determinations are the province of the fact-finder).

Consequently, the Court **AFFIRMS** the Secretary's decision.

SO ORDERED THIS 5TH day of May, 1995.

JEFFREY S. WOLFE
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JERRY LEWIS BROWN,

Plaintiff,

vs.

TULSA COUNTY BOARD OF COUNTY COMMISSIONERS, TULSA COUNTY, and CITY OF TULSA,

Defendants.

No. 94-C-1105-B

EOD 5/8/95

ORDER

This matter comes before the Court on the Motion to Dismiss of the City of Tulsa, filed on March 27, 1995. Plaintiff, a pro se litigant, has not responded.

Plaintiff's failure to respond to Defendant's motion constitutes a waiver of objection to the motion, and a confession of the matters raised by the motion. See Local Rule 7.1.C.[1] In any event, the Court concludes that the City of Tulsa was not involved in the alleged failure to conduct a competency hearing pursuant to 22 O.S. § 1175 et seq.

ACCORDINGLY, IT IS HEREBY ORDERED that:

(1) The motion to dismiss of the City of Tulsa (doc. #5) is **granted** and the City of Tulsa is hereby **dismissed with prejudice**.

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[1]Local Rule 7.1.C reads as follows:

Response Briefs. Response briefs shall be filed within fifteen (15) days after the filing of the motion. Failure to timely respond will authorize the court, in its discretion, to deem the matter confessed, and enter the relief requested.

(2) The Board of County Commissioners and the County of Tulsa are **dismissed** for lack of service.

SO ORDERED THIS 5 day of May, 1995.

THOMAS R. BRETT, Chief Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

WILLIAM T. LAWRENCE,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

Case No. 95-C-206-BU

ORDER

This matter comes before the Court upon the Report and Recommendation issued by United States Magistrate Judge Jeffrey S. Wolfe on April 17, 1995. The Court file reflects that neither of the parties has filed an objection to Magistrate Judge Wolfe's Report and Recommendation within the time prescribed by 28 U.S.C. § 636(b)(1). In accordance with § 636(b)(1), the Court has conducted a de novo review of this matter. Having done so, the Court agrees with the recommendation of Magistrate Judge Wolfe and accepts Magistrate Judge Wolfe's Report and Recommendation in its entirety.

Accordingly, the Court hereby AFFIRMS the Report and Recommendation (Docket No. 6) and DISMISSES WITHOUT PREJUDICE the above-entitled action.

ENTERED this 5 day of May, 1995.

Michael Burrage

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

CAROLYN CARROLL,

Plaintiff,

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES, Donna Shalala, Secretary,

Defendant.

93-C-1137-BU

ORDER

The Administrative Law Judge ("ALJ") denied Social Security disability benefits to Plaintiff Carolyn Carroll. Ms. Carroll now appeals that decision, claiming she is unable to work.[1] The appeal raises three issues: (1) The ALJ violated the treating physician rule; (2) The ALJ improperly analyzed Carroll's pain impairment; and (3) The ALJ erred by not obtaining the testimony of a Vocational Expert. The Court finds the first two arguments to be without merit, but remands the case for further findings as regards Ms. Carroll's third issue.

I. Standard of Review

The Court's role "on review is to determine whether the Secretary's decision is supported by substantial evidence." *Campbell v. Bowen*, 822 F.2d 1518, 1521 (10th Cir. 1987). Substantial evidence is what "a reasonable mind might deem adequate to support

[1] *In examining whether the Secretary erred, this Court's review is limited in scope by 42 U.S.C. § 405(g). Section 405(g) reads, in part: "Any individual, after the final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow...the findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive."*

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a conclusion." *Jordan v. Heckler,* 835 F.2d 1314, 1316 (10th Cir. 1987).[2] A finding of "no substantial evidence" is where a conspicuous absence of credible choices or no contrary medical evidence exists. *Trimiar v. Sullivan*, 966 F.2d 1326 (10th Cir. 1992).

Grounds for reversal also exist if the Secretary fails to apply the correct legal standard or fails to provide this Court with a sufficient basis to determine that appropriate legal principles have been followed. *Smith v. Heckler,* 707 F.2d 1284, 1285 (11th Cir. 1985).[3]

II. Legal Analysis

Ms. Carroll was born in 1945. She stands 5-foot-2 and weighed approximately 226 pounds at the time of the hearing before the ALJ. Her past relevant work was as a certified alcoholism and drug abuse counselor. She has a Bachelor of Arts degree in psychology and last worked in March of 1992. She alleges an onset date of March 11, 1992 and contends she cannot work because of pain resulting from arthritis, back problems, depression and on-going heart problems.

At step 4, the ALJ found that Ms. Carroll's impairments prevented her from returning to her past work. The ALJ then moved to step 5, where the Secretary bears the

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[2] *One treatise summarized what is considered evidence in a disability case: "Evidence may consist of, but is not limited to, objective medical evidence such as medical signs and laboratory findings; other medical evidence such as medical history, opinions, and statements concerning treatment received by the claimant; statements made by the claimant or others concerning the claimant's impairments, restrictions, daily activities, efforts to work, or any other relevant statements made to medical sources during the course of examination or treatment, or to the SSA [Secretary] during interviews, on applications, in letters or in testimony; medical evidence from other sources; decisions by any agency, governmental or otherwise, about whether the claimant is disabled or blind; and, at the administrative law judge and Appeals Council level of determination, findings made by nonexamining medical or psychological consultants or nonexamining physicians or psychologists. In addition, the SSA may consider opinions expressed by medical experts based on their review of the claimant's case record.* Social Security Law and Practice, *§37.1 (1993).*

[3] *A claim for benefits under the Social Security Act requires a five-step evaluation: (1) whether the claimant is currently working; (2) whether the claimant has a severe impairment; (3) whether the claimant's impairment meets an impairment listed in appendix 1 of the relevant regulation; (4) whether the impairment precludes the claimant from doing his past relevant work; and (5) whether the impairment precludes the claimant from doing any work. 20 C.F.R. § 404.1520(b)-(f) (1991). Once the Secretary finds the claimant either disabled or nondisabled at any step, the review ends. Gossett v. Bowen, 862 F.2d 802, 805 (10th Cir. 1988). In this case, the ALJ found, at step 5, that Plaintiff could return to work.*

burden of proof, and concluded that Ms. Carroll could do a full range of light work. In reaching this decision, the ALJ relied on the Medical-Vocational Guidelines ("Grids") and did not obtain the testimony of a Vocational Expert.

The first issue raised is whether the ALJ violated the "treating physician" rule. That rule requires the ALJ to give substantial weight to the claimant's treating physician unless good cause dictates otherwise. If the treating physician's opinion is disregarded, specific and legitimate reasons must be set forth by the Secretary. *Byron v. Heckler*, 742 F.2d 1232, 1235 (10th Cir. 1984).

The analysis is somewhat complicated by the fact that Carroll did not discuss which treating physician was disregarded by the ALJ. *Plaintiff's Brief at 2-3.* Instead, she complains because the ALJ gave too much weight to the evidence submitted by Dr. S.Y. Andelman, the Secretary's medical consultant. Dr. Andelman did not examine Carroll but merely reviewed the medical evidence.

The ALJ did place substantial weight on the Dr. Andelman, but that, in itself, was not improper. As noted by the Secretary in her brief, Dr. Andelman's opinion was similar -- although not identical -- to that of the other physicians. As a result, the record suggests that the ALJ properly weighed the various pieces of evidence before arriving at a conclusion. Therefore, this issue is without merit.

The second question raised by Carroll is whether the ALJ properly evaluated her complaints of pain. The rule on evaluating complaints of pain is examined in *Luna v. Bowen*, 834 F.2d 161 (10th Cir. 1987). The two-step analysis first requires the ALJ to determine whether a claimant has established a pain-producing impairment by objective

medical evidence. Second, the court must decide whether there is a "loose nexus" between the impairment and a claimant's subjective allegations of pain. If those two prongs are met, the question becomes whether, considering all the subjective and objective evidence, a claimant's pain is in fact disabling. *Id. at 163-164.*

In the instant case, the ALJ appears to have found that Carroll established a pain-producing impairment and found a loose nexus between the impairment and Plaintiff's subjective allegations of pain. The ALJ then, as discussed on pages 103-106 of the Record, examined the subjective and objective evidence and decided that Plaintiff's pain was not disabling.[4] Therefore, this issue is without merit.

The third issue raised by Carroll is the ALJ's decision to not obtain the testimony of a Vocational Expert. Whenever a claimant's residual functional capacity ("RFC") is diminished by both exertional and nonexertional impairments, the Secretary must produce expert vocational testimony or other similar evidence to establish the existence of jobs in the national economy. *Hargis v. Sullivan*, 945 F.2d 1482, 1491 (10th Cir. 1991). Pain is a nonexertional impairment and, even if not disabling, is still a nonexertional impairment to be taken into consideration, unless there is substantial evidence for the ALJ to find that the claimant's pain is insignificant. *Thompson v. Sullivan*, 987 F.2d 1482, 1490-1491 (10th Cir. 1993).

In this case, the medical evidence indicates that Carroll does suffer from pain as a result of her arthritis. Progress notes from the Veterans Administration frequently mention

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[4] *The ALJ wrote: "The [ALJ] recognizes that claimant may experience some degree of pain and discomfort [but] neither the objective medical evidence nor the testimony of the claimant establishes that the ability to function has been so severely impaired as to preclude all types of work activity." Transcript at page 18.*

this point *(Record at 341-430)* as do the reports from Dr. Terence Williams. *Id. at 445-451.* Dr. Andelman even acknowledged that Ms. Carroll had pain, although he described it as "mild." *Id. at 476, 483-485.* In addition, Ms. Carroll testified that she suffered from severe pain.[5]

This case, similar to many others dealing with this issue, is a close call: Does substantial evidence show Carroll's pain is insignificant? On one hand, substantial evidence supports the ALJ's finding that Carroll's pain is not disabling in itself. On the other hand, substantial evidence indicates that Carroll suffers from pain, although a question exists as to what degree.[6]

After much deliberation, the undersigned finds that the ALJ should have called a Vocational Expert to testify. No hard-and-fast rule on this issue exists, but *Allen v. Sullivan*, 880 F.2d 1200, 1201 (11th Cir. 1989), suggests that the ALJ should develop a full and fair record regarding the vocational opportunities available to a claimant. The court also writes:

> **In appropriate circumstances, the Grids may be used in lieu of vocational testimony... [But] ordinarily, when non-exertional limitations are alleged, vocational testimony is used. When there have been non-exertional factors alleged, the preferred method of demonstrating that the claimant can perform specific work is through the testimony of a Vocational Expert. It is only when the claimant can clearly do unlimited types of light work...that it is unnecessary to call a Vocational Expert to establish whether a claimant can**

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[5] *Credibility determinations are made by the ALJ. Diaz v. Secretary of Health and Human Services, 898 F.2d 774, 777 (10th Cir. 1990). For the most part, the ALJ's determination that Ms. Carroll's testimony was not credible because it was inconsistent with the medical evidence was proper. However, the ALJ also wrote that "claimant's conviction for armed robbery further diminishes the claimant's credibility." Record at 104. This comment is suspect, as the conviction took place in 1969 -- nearly 25 years prior to the hearing, and clearly has no bearing on a medical determination, or one involving assessment of pain.*

[6] *The ALJ's analysis, while arguably consistent with case law, appears inconsistent. At step 3, he found that Carroll had "severe arthritis, low back pain, neck pain and chest pain." Record at 106. At step 4, he found, with little explanation, that she could not perform her past work because of "exertional" limitations. Id. at 107. However, on step 5, he describes the pain as "mild" and therefore concluded she could work. Id. at 105.*

perform work which exists in the national economy. *Id. at 1202 (other cites omitted).*

In sum, the Secretary bears the burden of proof at step 5. *Ragland v. Shalala,* 992 F.2d 1056 (10th Cir. 1993). A review of the record shows that substantial evidence does not support the ALJ's apparent conclusion that Ms. Carroll's pain was *insignificant* and, as a result, a Vocational Expert should have testified. Therefore, the case is **REMANDED** so that the ALJ can obtain such testimony. A supplemental hearing shall be held where the Vocational Expert testifies. The ALJ then must re-examine the evidence in light of this new testimony to determine whether Ms. Carroll's impairments prevent her from working in the national economy; and whether she is entitled to benefits as claimed.

SO ORDERED THIS 5TH day of May, 1995.

JEFFREY S. WOLFE
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

SHEILA R. CUNNINGHAM,

Plaintiff,

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES, Donna Shalala, Secretary,

Defendant.

93-C-0961-E

ORDER

Plaintiff Shelia Cunningham seeks judicial review of a decision by the Secretary of Health and Human Services. The Secretary's decision denied Social Security disability benefits to Ms. Cunningham, concluding that she could work at sedentary jobs. In reaching that decision, the Secretary used the Medical-Vocational guidelines ("Grids") as framework for her decision.[1]

Plaintiff, who has a 10th grade education and was born in 1944, applied for disability benefits under Titles II and XVI of the Social Security Act. She alleges disability since September of 1990 because of sciatica, pain and numbness in her back, hip and leg. On appeal, Ms. Cunningham raises three issues: (1) Whether the Administrative Law Judge ("ALJ") erred by not finding her disabled according to the Grids; (2) whether substantial evidence supports the ALJ's decision; and (3) Whether the ALJ erred by not obtaining

[1] *In examining whether the Secretary erred, this Court's review is limited in scope by 42 U.S.C. § 405(g). Section 405(g) reads, in part: "Any individual, after the final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow...the findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive."*

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Vocational Expert testimony.

I. Standard of Review

The Court's role "on review is to determine whether the Secretary's decision is supported by substantial evidence." *Campbell v. Bowen*, 822 F.2d 1518, 1521 (10th Cir. 1987). Substantial evidence is what "a reasonable mind might deem adequate to support a conclusion." *Jordan v. Heckler,* 835 F.2d 1314, 1316 (10th Cir. 1987).[2] A finding of "no substantial evidence" is where a conspicuous absence of credible choices or no contrary medical evidence exists. *Trimiar v. Sullivan*, 966 F.2d 1326 (10th Cir. 1992).

Grounds for reversal also exist if the Secretary fails to apply the correct legal standard or fails to provide this Court with a sufficient basis to determine that appropriate legal principles have been followed. *Smith v. Heckler,* 707 F.2d 1284, 1285 (11th Cir. 1985).[3]

II. Legal Analysis

The issue of particular concern to this Court is the absence of testimony from the

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[2] *One treatise summarized what is considered evidence in a disability case: "Evidence may consist of, but is not limited to, objective medical evidence such as medical signs and laboratory findings; other medical evidence such as medical history, opinions, and statements concerning treatment received by the claimant; statements made by the claimant or others concerning the claimant's impairments, restrictions, daily activities, efforts to work, or any other relevant statements made to medical sources during the course of examination or treatment, or to the SSA [Secretary] during interviews, on applications, in letters or in testimony; medical evidence from other sources; decisions by any agency, governmental or otherwise, about whether the claimant is disabled or blind; and, at the administrative law judge and Appeals Council level of determination, findings made by nonexamining medical or psychological consultants or nonexamining physicians or psychologists. In addition, the SSA may consider opinions expressed by medical experts based on their review of the claimant's case record.* Social Security Law and Practice, *§37.1 (1993).*

[3] *A claim for benefits under the Social Security Act requires a five-step evaluation: (1) whether the claimant is currently working; (2) whether the claimant has a severe impairment; (3) whether the claimant's impairment meets an impairment listed in appendix 1 of the relevant regulation; (4) whether the impairment precludes the claimant from doing his past relevant work; and (5) whether the impairment precludes the claimant from doing any work. 20 C.F.R. § 404.1520(b)-(f) (1991). Once the Secretary finds the claimant either disabled or nondisabled at any step, the review ends. Gossett v. Bowen, 862 F.2d 802, 805 (10th Cir. 1988). In this case, the ALJ found, at step 5, that Plaintiff could return to work.*

Vocational Expert.[4] Whenever a claimant's residual functional capacity ("RFC") is diminished by both exertional and nonexertional impairments, the Secretary must produce expert vocational testimony or other similar evidence to establish the existence of jobs in the national economy. *Hargis v. Sullivan*, 945 F.2d 1482, 1491 (10th Cir. 1991).

In this case, the question boils down to whether Cunningham's "pain" was insignificant. As discussed in *Thompson v. Sullivan*, 987 F.2d 1482, 1490-1491 (10th Cir. 1993), the court explained that "pain, even if not disabling, is still a **nonexertional impairment to be taken into consideration**, unless there is substantial evidence for the ALJ to find that the claimant's pain is insignificant."

Review of the record indicates that substantial evidence does not support the ALJ's decision that Ms. Cunningham's pain was insignificant. Ms. Cunningham, 48 years old at the time of the hearing, testified that she had pain in her back and legs. She described it as if someone was "sticking a poker into [her] spine." *Record at 38.* The ALJ found such testimony to be not credible, which is within his province. However, his finding is nevertheless suspect because the medical evidence supports the fact that Ms. Cunningham suffered from pain in her back and legs.[5]

For example, Dr. Terrell Simmons, an M.D., examined Ms. Cunningham on September 28, 1990 and found that she had "severe back pain." On October 10, 1990, he noted that her condition had improved, but still found she had a "painful back." *Record at*

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[4] *The analysis in this case are similar to those in Ragland v. Shalala, 992 F.2d 1056 (10th Cir. 1993). First, the ALJ found, at step 5, that Cunningham could do sedentary type work. This means the burden of proof in this appeal is on the Secretary. Id. at 1058. The second guidepost concerns the ALJ's application of the Grids. As discussed in Ragland, the Grids should not be applied* ***"unless the claimant could perform the full range of work required of [the pertinent RFC] category on a daily basis and unless the claimant possesses the physical capacities to perform most of the jobs in that range."*** *Id., citing Hargis v. Sullivan, 945 F.2d 1482, 1490 (10th Cir. 1991).*

[5] *Substantial evidence supports the ALJ's finding that the pain was not disabling.*

212. On October 24, 1991, Dr. Bat Shunatona, a treating physician, found that Ms. Cunningham's "arthritis and chronic pain" prevented her from seeking or maintaining permanent job placement. *Id. at 229.* On October 14, 1992, Dr. Michael Karathanos, an M.D., found that "all movements of [Cunningham's] lumbosacral spine were with "**significant pain**". *Id. at 264.* These findings were, for the most part, consistent with an April 30, 1991 examination by Dr. Michael Farrar. *Id. at 224-225.*

The record thus indicates that Ms. Cunningham suffers from a nonexertional impairment. As a result, the Court **REMANDS** the case for further consideration by the Secretary. Due to Ms. Cunningham's nonexertional impairment (i.e., pain in her back and legs) the ALJ must obtain the testimony of a Vocational Expert to determine what limitations Ms. Cunningham's acknowledged back and leg pain might impose on her capacity to perform sedentary work. *Thompson,* 987 F.2d at 1491.[6]

In making this decision, the undersigned makes no opinion as to whether Ms. Cunningham is disabled. On remand, the ALJ must re-examine the evidence, including the testimony of the Vocational Expert, to make that determination, consistent with the foregoing.

SO ORDERED THIS 5TH day of May, 1995.

JEFFREY S. WOLFE
UNITED STATES MAGISTRATE JUDGE

[6] *The Court, however, affirms the Secretary's decision in respect to the Title II disability benefits. As noted by the Secretary and the ALJ, Cunningham did not submit pertinent medical evidence to the Secretary that discussed her condition prior to September 30, 1986 -- the date she was last insured. In addition, the Court finds that Cunningham's arguments (See Plaintiff's Brief at pages 5-6) concerning her age are without merit.*

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

CHRISTOPHER E. LONGSTRETH,

Petitioner,

vs.

MICHAEL CODY,

Respondent.

No. 93-C-890-E

ORDER

This is a proceeding on a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner, currently confined in the Oklahoma Department of Corrections, challenges the judgment and sentence of the Tulsa County District Court, entered in Case No. CRF-87-601, for Shooting with Intent to Kill, after Former Conviction of Two or More Felonies, on May 5, 1987. The trial court sentenced Petitioner to forty-five years in prison. Respondent has filed a Rule 5 Response to which Petitioner has replied. Petitioner has also filed a motion for an evidentiary hearing. As more fully set out below, the Court concludes that the petition for a writ of habeas corpus should be denied.

I. BACKGROUND

On February 3, 1987, Tulsa City Police Officers David Brockman and John Jakubowski set up surveillance at 3516 E. 12th Place in Tulsa, Oklahoma, in an attempt to find Petitioner. A warrant had been issued for Petitioner's arrest. Later that afternoon, officers Meyer and Blair joined Brockman and Jakubowski. After

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telephoning the home to verify whether someone was home, an officer knocked on the door and announced his presence but received no response. After knocking two more times and observing a man (which an officer recognized to be Petitioner) at an upstairs window, the officers called for assistance and then kicked in the door and began searching the house room by room. Officers Brockman and Cartner ultimately discovered Petitioner underneath a clothes rack in the attic. Although the officers ordered Petitioner to raise his hands, he did not comply and attempted to scoot away. Officer Brockman then heard the man state, "you don't want me to come out." The Petitioner then raised up over the clothes rack, pointed a revolver at Brockman and stated: "I'm loaded and I'll do you." Several shots were then exchanged resulting in a wound to Petitioner's face. Petitioner's projectile did not strike Officer Brockman.

Following his arrest, Petitioner was taken to the hospital where he underwent surgery, treatment, and intensive hospital care for three weeks. Upon release to the Tulsa County Jail Medical Personnel on February 23, 1987, Petitioner's "jaws were wired shut" and he breathed through a tracheotomy. (Petition, doc. #1, at 5a.) The Tulsa County Jail Medical Personnel began administering "narcotic type sedative and pain medications and psycoactive [sic] medications." (Petition, doc. #1, at 5a.) On February 26, 1987, Petitioner appeared at his arraignment with his jaws wired and still breathing through a tracheotomy. The Court entered a plea of not guilty and appointed the public defender's office.

On the same day, Officer Richard Bishop visited Petitioner at the Tulsa County Jail to see if he would make a statement in connection with the Police Department's internal investigation of the shooting. Petitioner, however, refused to make any statements without his lawyer. Officer Bishop then explained that no further questions would be asked and the public defender would be contacted to see if a statement could be made at a later time. Before leaving, Officer Bishop inquired how Petitioner was doing and that he had been keeping "tabs" on him through Petitioner's brother. After re-asking the officer's name, Petitioner recalled that his brother had mentioned him and told Officer Bishop: "you tell the officer that he did right. He did what he had to do. I had a gun."

Following a March 10, 1987 preliminary hearing, the public defender's office withdrew as counsel for Petitioner and retained counsel entered his appearance. Thereafter the case was set for a jury trial. On April 22, 1987, the trial court denied Petitioner's motion in limine concerning the statements he gave to Officer Bishop at the Tulsa County Jail on February 26, 1987. During cross-examination at the hearing, Officer Bishop admitted that he had not read Petitioner his Miranda rights. He stated, however, that he was simply inquiring of Petitioner's condition and that he had no intention of carrying on any further conversation. The trial court overruled Petitioner's Motion to Suppress at trial. On April 23, 1987, Petitioner was found guilty of shooting with intent to kill.

On appeal, Petitioner's counsel raised five grounds of error. Petitioner also filed a supplemental pro se brief raising three additional grounds of error: (1) that he was incompetent to stand trial; (2) that he was denied counsel of choice; and (3) that he received ineffective assistance of counsel. On January 25, 1995, the Court of Criminal Appeals affirmed the conviction. Petitioner filed a motion for rehearing which was denied on February 25, 1991. Thereafter, Petitioner filed an application for post-conviction relief, raising eleven grounds of error. The Tulsa County District Court denied relief and the Court of Criminal Appeals affirmed.

In the present petition for a writ of habeas corpus, Petitioner raises eight grounds for habeas relief: (1) that the trial court failed to hold a competency hearing sua sponte; (2) that appointed counsel failed (a) to obtain a competency determination, (b) to investigate his mental health history and the shooting scene, and (c) to challenge the sufficiency of the evidence at the preliminary hearing; (3) that there was insufficient evidence to support his conviction; (4) that his trial counsel failed to a file a motion to suppress the warrantless search and the inculpatory statement that resulted from it; (5) that Petitioner was denied his right to testify on his own behalf; (6) that a statement was introduced into evidence which was made during the course of a custodial interrogation without Miranda warnings; (7) that he was denied a reasonable opportunity to retain counsel of his choice for the preliminary hearing; and (8) that court-appointed counsel erroneously stipulated to the validity of

his prior conviction at the preliminary hearing.

II. ANALYSIS

As a preliminary matter, the Court finds that Petitioner meets the exhaustion requirements under the law. See Rose v. Lundy, 455 U.S. 509, 510 (1982). The Court also finds that an evidentiary hearing is not necessary as the issues can be resolved on the basis of the record, see Townsend v. Sain, 372 U.S. 293, 318 (1963), overruled in part by Keeney v. Tamayo-Reyes, 501 U.S. 1 (1992).

A. Competency

In his first ground of error, Petitioner challenges the state trial court's failure to hold a hearing sua sponte on his competency to stand trial. He contends that "he was incompetent during critical stages of the criminal proceedings in CRF-87-601" and that the trial court's failure to hold a competency hearing sua sponte "denied [him] due process as construed in Pate v. Robinson, 383 U.S. 375 (1966)." (Petitioner's reply, doc. #9, at 1.) Petitioner argues that the facts that he was under the "involuntary influence of narcotic and psychoactive medications," that he had bruises and fresh scar tissue on his face, that his "mouth was wired shut," and that he "was breathing through a trache[otomy]" during his initial appearance sufficiently establish a bona fide doubt as to his competency to stand trial.

"[T]he conviction of an accused person while he is legally incompetent violates due process." Pate, 383 U.S. at 378; see also

Lafferty v. Cook, 949 F.2d 1546, 1550 (10th Cir. 1991) (competency to stand trial is aspect of substantive due process), cert. denied, 112 S.Ct. 1942 (1992). The test for whether a defendant is competent to stand trial is whether he "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding--and whether he has a rational as well as factual understanding of the proceedings against him." Dusky v. United States, 362 U.S. 402, 402 (1960). "The failure to observe procedures adequate to protect a defendant's right not to be tried or convicted while incompetent to stand trial deprives him of his due process right to a fair trial." Fallada v. Dugger, 819 F.2d 1564, 1568 (11th Cir. 1987) (citing Drope v. Missouri, 420 U.S. 162, 172 (1975); Pate v. Robinson, 383 U.S. 375, 384-86 (1966)). Due process requires that a competency hearing be held when the evidence raises a "bona fide doubt" as to a defendant's competence to stand trial. Pate, 383 U.S. at 385.

In reviewing whether a trial court should have conducted a hearing on the issue of a defendant's competence to stand trial, the Tenth Circuit Court of Appeals recently restated the following:

> "We must determine 'whether a reasonable judge, situated as was the trial court judge whose failure to conduct an evidentiary hearing is being reviewed, should have experienced doubt with respect to [the defendant's] competency to stand trial.'" Coleman v. Saffle, 912 F.2d 1217, 1224 (10th Cir.), cert. denied, 497 U.S. 1053 (1990) (quoting United States v. Crews, 781 F.2d 826, 833 (10th Cir. 1986) (citations omitted)). "[A] trial court need not conduct a competency hearing when there has been only minimal or no evidence of incompetence." Crews, 781 F.2d at 833. There must be some evidence to create a "bona fide doubt" on the issue; merely raising the issue is not enough. Coleman, 912 F.2d at 1226 (citation omitted).

Baca, ___ F.3d ___, 1995 WL 135658, at *3 (10th Cir. Mar. 27, 1995).[1] Three factors must be considered in determining whether a Pate violation has occurred: any history of irrational behavior, defendant's trial demeanor, and prior medical opinion. Id. at 3.

In light of the information available to the state trial judge, this Court concludes that he did not err in failing to hold a competency hearing sua sponte. The fact that Petitioner was bruised, had scar tissue, and was breathing through a tracheotomy is insufficient to show anything other than physical disability. Moreover, the fact that Petitioner "was being treated with pain killers did not per se render him incompetent to stand trial." Fallada, 819 F.2d at 1569. Petitioner no where alleges that the trial court was aware that he was taking Valium and other painkillers. In any event, "[t]he use of drugs is merely a relevant factor in the trial judge's determination" whether to hold an evidentiary hearing on a defendant's competency. Id., 819 F.2d at 1569. "To be entitled to a hearing a defendant must present evidence demonstrating that the dosage given him has affected him sufficiently adversely as to raise a doubt of his ability to consult with his lawyer and to have a rational understanding of the proceedings against him." Id.

Petitioner did not present evidence that raised a bona fide doubt as to his mental capacity to meaningfully participate in his

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[1]The issue of the right to a competency hearing is separate from the inquiry of whether the defendant was competent to stand trial. Sheley v. Singletary, 955 F.2d 1434, 1437(11th Cir. 1992).

trial and cooperate with counsel. A review of the trial transcript does not reveal anything that would cause this Court to doubt Petitioner's competency to stand trial. Moreover, neither Petitioner's appointed nor his retained counsel had any reason to doubt Petitioner's competency. Accordingly, the trial court did not deny Petitioner a fair trial by failing to hold a competency hearing based on the record before it.

B. Ineffective Assistance of Counsel

In his second and eighth grounds for habeas relief, Petitioner contends that his court-appointed counsel, who represented Petitioner only at the preliminary hearing, provided ineffective assistance of counsel in violation of his Sixth Amendment rights. He alleges that his court-appointed counsel failed to obtain a competency determination and investigate Petitioner's mental health history and the shooting scene, failed to challenge the sufficiency of the evidence at the preliminary hearing, and stipulated to an allegedly invalid prior conviction at the preliminary hearing. In his fourth ground for habeas relief, Petitioner contends that his retained counsel provided ineffective assistance in violation of his Sixth Amendment rights when he failed to file a motion to suppress the warrantless search and the statement "I'm loaded and I'll do you."

To establish ineffective assistance of counsel a petitioner must show that his counsel's performance was deficient and that the deficient performance prejudiced his defense. Strickland v.

Washington, 466 U.S. 668, 687 (1984); Osborn v. Shillinger, 997 F.2d 1324, 1328 (10th Cir. 1993). A petitioner can establish the first prong by showing that counsel performed below the level expected from a reasonably competent attorney in criminal cases. Strickland, 466 U.S. at 687-88. "The proper standard for measuring attorney performance is reasonably effective assistance." Gillette v. Tansy, 17 F.3d 308, 310-311 (10th Cir. 1994) (quoting Laycock v. New Mexico, 880 F.2d 1184, 1187 (10th Cir. 1989)). In doing so, a court must "judge . . . [a] counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, 466 U.S. at 690. There is a "strong presumption [however,] that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 695. Moreover, review of counsel's performance must be highly deferential. "[I]t is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Id. at 689.

To establish the second prong, a petitioner must show that this deficient performance prejudiced the defense, to the extent that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. See also Lockhart v. Fretwell, 113 S. Ct. 838, 842-44 (1993) (holding counsel's unprofessional errors must cause a trial to be "fundamentally unfair or unreliable"). There is no reason to address both components of the Strickland inquiry

if the petitioner makes an insufficient showing on one. Strickland, 466 U.S. at 697.

The Court will address first the ineffective assistance of Petitioner's appointed counsel prior to and at the preliminary hearing, and second the ineffective assistance of retained counsel at trial.

1. Ineffective Assistance of Appointed Counsel

Initially the Court notes that Petitioner's claims that his appointed counsel provided ineffective assistance fail to meet at least the second prong of the Strickland test. As these alleged errors focus only on the performance of Petitioner's court-appointed counsel prior to an at the preliminary hearing, Petitioner has failed to show how his defense at trial was prejudiced in any way by this deficient performance. In any event, after reviewing the merits of each of the alleged instances of ineffective assistance, the Court concludes Petitioner is not entitled to habeas relief.

"In order to demonstrate prejudice from his lawyer's failure to have him evaluated, [Petitioner] has to show that there was at least a reasonable probability that a psychological evaluation would have revealed that he was incompetent to stand trial." Alexander v. Dugger, 841 F.2d 371, 375 (11th Cir. 1988). "The legal test for competency to stand trial is whether, at the time of the trial and sentencing, the petitioner had 'sufficient present ability to consult with his lawyer with a reasonable degree of

rational understanding' and whether he had 'a rational as well as factual understanding of the proceedings against him.'" Id. (quoting Dusky v. United States, 362 U.S. 402, 402 (1960)).

Petitioner has failed to meet his burden of proving that there was a reasonable probability that a psychological evaluation would have revealed that he was incompetent to stand trial. He fails to give any examples suggesting that at the time of his trial he did not have the ability to consult with his lawyer or that he did not understand the proceedings against him, and merely relies on his physical condition at the preliminary hearing and the fact that he had a history of mental problems. Petitioner also fails to explain how these past problems affected his ability to consult with his lawyer or understand the proceedings against him. Accordingly, this Court must conclude that court-appointed counsel was not ineffective for failing to investigate Petitioner's mental health history and have him psychologically evaluated to determine if he was competent to stand trial.

Similarly, Petitioner cannot establish any prejudice as a result of appointed counsel's failure to investigate the shooting scene and challenge the sufficiency of the evidence at the preliminary hearing. As Petitioner concedes in his brief, retained counsel investigated the shooting scene shortly after he appeared in the case and an expert witness was called at trial to testify as to the direction of the bullets. (Trial Tr. at 139-161.) Moreover, any attempts by appointed counsel to challenge the sufficiency of the evidence at the preliminary hearing on the

ground that there was no battery of the victim in Petitioner's case would have been futile. Oklahoma courts have long held that a conviction for Shooting with Intent to Kill does not require the actual striking of a person with a projectile. Crenshaw v. State, 654 P.2d 637, 638 (Okla. Crim. App. 1982); 21 O.S. 1981, § 652.

Lastly, even if appointed counsel's performance in stipulating to an allegedly invalid prior conviction at the preliminary hearing may not have been objectively reasonable, Petitioner was not prejudiced at trial. Because the stipulation as to the prior convictions was for purposes of the preliminary hearing only, (preliminary hrg. tr. at 59), the enhancement portion of Petitioner's trial proceeded in the statutory fashion with the burden upon the State of Oklahoma to prove the existence of the former convictions and the punishment beyond a reasonable doubt. Okla. Stat. tit. 22, § 860(b). But cf. Johnson v. Cowley, 40 F.3d 341, 344 (10th Cir. 1994) (where counsel stipulated to the fact of the former conviction during the enhancement portion of the trial outside of the presence of the defendant, and the enhancement portion of the trial did not proceed in the statutory fashion). The jury had the option of finding Petitioner not guilty on the former conviction charges and assess punishment as if he was a first time offender, or finding him guilty of the prior convictions and assess punishment at not less than twenty years. (Trial tr. at 194, 198-200, 202-203.) Fogle v. State, 700 P.2d 208, 211 (Okla. Crim. App. 1985).

Accordingly, this Court must conclude that appointed counsel

was not ineffective in the constitutional sense and Petitioner is not entitled to habeas relief on the above grounds of error.

2. Ineffective Assistance of Trial Counsel

Petitioner's claim of ineffective assistance of trial counsel fares no better. Even if counsel had filed a motion to suppress the warrantless entry into the house and the statement of the Petitioner, "I'm loaded and I'll do you," Petitioner would not have prevailed. The police officers properly entered the home at 3516 E. 12th Place without a search warrant because they were trying to execute an arrest warrant for Petitioner and they had reasonable belief that Petitioner was inside. See Payton v. New York, 445 U.S. 573, 602-03 (1980) (arrest warrant sufficiently protects an arrestee's Fourth Amendment rights if there was reason to believe he was inside). The officers had recognized Petitioner's car outside the building, had verified through several phone calls that a white male other than the known occupant of the house was inside, and prior to entering the house, they saw Petitioner at a second floor window. Therefore, a motion to suppress the statement--"I'm loaded and I'll do you"--would have been futile and Petitioner's trial counsel was not ineffective for failing to file such a motion.

C. Insufficiency of the Evidence and Jury Instructions

In his third ground, Petitioner contends that "he was

convicted upon a degree of proof below that required by due process," because there was no battery of Officer Brockman. He further argues that a reasonable juror could have construed jury instruction Nos. 3 and 5 to state that the actual striking of a person was not an essential element of the crime of shooting with intent to kill. (Petition, doc. #1, at 8a.)

A habeas corpus petitioner "bears a 'great burden . . . when [he] seeks to collaterally attack a state court judgment based on an erroneous jury instruction.'" Lujan v. Tansy, 2 F.3d 1031, 1035 (10th Cir. 1993) (quoting Hunter v. New Mexico, 916 F.2d 595, 598 (10th Cir. 1990), cert. denied, 500 U.S. 909 (1991)), cert. denied, 114 S. Ct. 1074 (1994). Federal habeas corpus relief is not available for alleged errors of state law, and this Court examines only "'whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process.'" Estelle v. McGuire, 502 U.S. 62, 72 (1991) (quoting Cupp v. Naughten, 414 U.S. 141, 147 (1973)). Moreover, it is well established that "'[h]abeas proceedings may not be used to set aside a state conviction on the basis of erroneous jury instructions unless the errors had the effect of rendering the trial so fundamentally unfair as to cause a denial of a fair trial in the constitutional sense.'" Shafer v. Stratton, 906 F.2d 506, 508 (10th Cir.) (quoting Brinlee v. Crisp, 608 F.2d 839, 854 (10th Cir. 1979), cert. denied, 444 U.S. 1047 (1980)), cert. denied, 498 U.S. 961 (1990).

The Court finds no fundamental unfairness in Petitioner's

trial which would be sufficient to set aside Petitioner's conviction for shooting with intent to kill. As stated by the Court of Criminal Appeals on direct appeal, the crime of Shooting with Intent to Kill does not require the "actual striking of a person with a projectile. (Opinion at 3, citing Crenshaw v. State, 654 P.2d 637, 639 (Okla. Crim. App. 1982)). The Court stated that "[i]t would not make sense to reward a defendant for being a bad shot." Id. So to the extent that Petitioner is challenging the elements of the crime of Shooting with Intent to Kill under Oklahoma state law, Petitioner is not entitled to habeas relief. See Lewis v. Jeffers, 497 U.S. 764, 780 (1990) (violation of state law is an insufficient ground to grant habeas relief).

In the event Petitioner also challenges the sufficiency of the evidence at his state trial, the Court will proceed to review that issue as well. Sufficiency of the evidence for constitutional purposes is essentially a question of law. As such this Court reviews a habeas claim of insufficiency to determine "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319 (1979). In reviewing a sufficiency claim, the Court must not weigh conflicting evidence or consider witness credibility. United States v. Davis, 965 F.2d 804, 811 (10th Cir. 1992), cert. denied, 113 S. Ct. 1255 (1993). Instead the Court must view the evidence in the light most favorable to the prosecution, Jackson, 443 U.S. at 319, and "accept

the jury's resolution of the evidence as long as it is within the bounds of reason." Grubbs v. Hannigan, 982 F.2d 1483, 1487 (10th Cir. 1993). Additionally a state court's findings of fact on the sufficiency issue are entitled to a presumption of correctness unless challenged by convincing evidence that the factual determination in the state court was erroneous. 28 U.S.C. § 2254(d); Sumner v. Mata, 455 U.S. 591, 597 (1982).

After a thorough review of the evidence, the Court concludes that a reasonable juror could have found the evidence sufficient to show that Petitioner committed the crime of Shooting with the Intent to Kill. Therefore, Petitioner's third ground for relief must also be denied.

E. Petitioner's Right to Testify at Trial

Next Petitioner contends that he was denied the right to testify on his own behalf at his trial. Specifically, he states the following:

> Had Petitioner been allowed to recover to a level of legal competence, and had he been allowed to testify, Petitioner would have testified that:
>
> (i) Petitioner stated to Brockman, "You don't want me . . . I'm no good to you;
>
> (ii) All gunshots were fired in the direction of Petitioner at the floor;
>
> (iii) No gunshots were fired at Brockman;
>
> (iv) Petitioner had no intentions of harming or killing anyone.

(Petition, doc. #1, at 8e.)

Because Petitioner raised this issue for the first time in his

post-conviction application, the Tulsa County District Court and the Oklahoma Court of Criminal Appeals found the claim procedurally barred as it could have been raised on direct appeal.

The doctrine of procedural default prohibits a federal court from considering a specific habeas claim where the state highest court declined to reach the merits of that claim on state procedural grounds, unless a petitioner "demonstrate[s] cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate[s] that failure to consider the claim[] will result in a fundamental miscarriage of justice." Coleman v. Thompson, 501 U.S. 722, 749-750 (1991); see also Gilbert v. Scott, 941 F.2d 1065, 1067-68 (10th Cir. 1991). The "cause and prejudice" standard applies to pro se prisoners just as it applies to prisoners represented by counsel. Rodriguez v. Maynard, 948 F.2d 684, 687 (10th Cir. 1991).

The cause standard requires a petitioner to "show that some objective factor external to the defense impeded . . . efforts to comply with the state procedural rules." Murray v. Carrier, 477 U.S. 478, 488 (1986). Examples of such external factors include the discovery of new evidence, a change in the law, and interference by state officials. Id. As for prejudice, a petitioner must show "'actual prejudice' resulting from the errors of which he complains." United States v. Frady, 456 U.S. 152, 168 (1982). A "fundamental miscarriage of justice" instead requires a petitioner to demonstrate that he is "actually innocent" of the crime of which he was convicted. McCleskey v. Zant, 499 U.S. 467,

494 (1991).

Petitioner does not dispute that he defaulted his claim that he was denied the right to testify at trial pursuant to an independent and adequate state procedural rule. He argues, however, that the doctrine of procedural default should not be applied to bar review of such a fundamental right. This Court does not agree. The fact that the right to testify is fundamental and personal to a defendant and therefore that it cannot be waived by his attorney, see Rock v. Arkansas, 483 U.S. 44 (1987), is irrelevant to the doctrine of procedural default. The Supreme Court has specifically held that a procedural default bars consideration of any federal claim on habeas review as long as the last state court rendering a judgment in the case "clearly and expressly" states that its judgment rests on a state procedural bar. Harris v. Reed, 489 U.S. 255, 265 (1989). Therefore, Petitioner is procedurally barred from raising his claim unless he shows cause and prejudice for his default.

Although Petitioner asserts that he did not testify at his trial, he has not explained why he did not raise this issue on direct appeal. The mere fact that Petitioner's appellate counsel failed to recognize this issue and raise it on direct appeal is not cause unless the omission amounts to ineffective assistance of counsel under Strickland v. Washington, 466 U.S. 668 (1984), which Plaintiff has failed to allege and establish in this case. See also Jones v. Barnes, 463 U.S. 745, 754 (1983). Petitioner's only other means of gaining federal habeas review is a claim of actual

innocence. Sawyer v. Whitley, 112 S.Ct. 2514, 2519-20 (1992). However, in his section 2254 petition, Petitioner does not claim actual innocence, but contests only his retained counsel's failure to file a direct appeal. Accordingly, this Court must conclude that Petitioner procedurally defaulted his claim that he was denied his right to testify at trial.

F. Inculpatory Statement

Next Petitioner contends that his right to counsel was violated when Officer Bishop allegedly continued the conversation on February 26, 1987, at the Tulsa County Jail, resulting in Petitioner making the following inculpatory statements, although he had requested an attorney: "You tell the officer that he did right. He did what he had to do. I had a gun." The Oklahoma Court of Criminal Appeals considered this allegation and found that there was no error in the admission of Petitioner's statements. (Ex. C, attached to Respondent's Response, at 3-5.) On the basis of the facts outlined in the "Background" section of this order, the Court of Criminal Appeals made the following findings of fact: (1) that Petitioner made his desire for silence very evident and that Officer Bishop ceased questioning at that time; and (2) that the incriminating statements were made as Officer Bishop was leaving when he had no intention of interrogating Petitioner, but was simply asking about his condition.

These findings of fact are entitled to a presumption of correctness under 28 U.S.C. § 2254(d). Petitioner has not

demonstrated that any of the seven exceptions to the presumption of correctness set forth in section 2254(d)(1)-(7) apply to this case, or that the factual determinations made by the Oklahoma Court of Criminal Appeals are not fairly supported by the evidence in the state court record. Thus, the Court of Appeal's findings of fact are entitled to a presumption of correctness.

Based on these findings, this Court finds that Officer Bishop's conversation with Petitioner as he was leaving did not amount to an "interrogation." Officer Bishop did not try to resume the questioning or in any way to persuade Petitioner to reconsider his decision that he would not comment without counsel being present. Rather Officer Bishop merely inquired about Petitioner's health, an issue totally unrelated from the shooting. "This is not a case, therefore, where the police failed to honor a decision of a person in custody to cut off questioning, either by refusing to discontinue the interrogation upon request or by persisting in repeated efforts to wear down his resistance and make him change his mind." Michigan v. Mosley, 423 U.S. 105, 105-106 (1975). Petitioner's comments to Officer Bishop were voluntary and therefore Miranda has no application. United States v. Griffin, 922 F.2d 1343, 1357 (8th Cir. 1990) (Miranda has application only to statements that are offered involuntarily and that are the product of either express questioning or police practice reasonably likely to evoke an incriminating response); see also United States v. Suggs, 755 F.2d 1538, 1542 (11th Cir. 1985) ("voluntary comments unresponsive to governmental questioning are admissible even after

Miranda rights are asserted"). Accordingly, Petitioner's right to counsel was not violated and Petitioner is not entitled to habeas relief on this ground.

G. Appointment of Counsel At Arraignment

Lastly, Petitioner contends that he was denied a reasonable opportunity to retain counsel of his own choice when the trial court appointed the Public Defender's Office at the initial appearance without inquiring into Petitioner's financial status. The Court finds this proposition of error meritless.

The Sixth Amendment guarantees a criminal defendant the right "to have the Assistance of Counsel for his defense." U.S. Const., amend. VI. It is well-settled that a component of this right is the protection of a defendant's opportunity to obtain counsel of choice. Powell v. Alabama, 287 U.S. 45, 53 (1932); United States v. Collins, 920 F.2d 619, 624-26 (10th Cir. 1990), cert. denied, 500 U.S. 920 (1991). The Sixth Amendment does not, however, ensure that a defendant will inexorably be represented by the lawyer whom he prefers. United States v. Romano, 849 F.2d 812, 819 (3rd Cir. 1988).

While the trial court initially appointed the Public Defender's Office without inquiry into Petitioner's financial status, Petitioner conveniently overlooks the fact that appointed counsel withdrew after the preliminary hearing to permit retained counsel to enter his appearance and proceed to trial. Therefore, this is not a case where the trial court arbitrarily denied a

defendant's request for counsel of choice, see Romano, 849 F.2d at 820, but merely a situation where the public defender's office was appointed at the initial appearance and Petitioner did not object to the representation. Accordingly, any errors in the initial appointment was harmless. See Doyle v. United States, 366 F.2d 394, 396 (9th Cir. 1966) (where the Ninth Circuit Court of Appeals held that though counsel was appointed without inquiry into the petitioner's financial condition or his desire for counsel there was no error because petitioner accepted the counsel).

III. CONCLUSION

After carefully reviewing the record in this case, the Court concludes that the Petitioner has not established that he is in custody in violation of the Constitution or laws of the United States. Accordingly, the petition for a writ of habeas corpus (doc. #1) and Petitioner's motion for an evidentiary hearing (doc. #14) are **denied**.

SO ORDERED THIS 4TH day of May, 1995.

JAMES O. ELLISON, Senior Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

MAY - 4 1995

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

RAY MINNERUP,

Plaintiff,

vs.

ROBBY JACKSON, et al.,

Defendants.

No. 94-C-443-B

EOD 5/5/95

ORDER

On April 14, 1995, the Court notified Plaintiff that in eleven (11) days it would dismiss this action for lack of prosecution. Plaintiff has not responded.

ACCORDINGLY, IT IS HEREBY ORDERED that this action is hereby **dismissed** for lack of prosecution.

SO ORDERED THIS 4 day of May, 1995.

THOMAS R. BRETT, Chief Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

RANDY AND JANET MUNINGER,

Plaintiff,

v.

FEDERAL DEPOSIT INSURANCE COMPANY, in its corporate capacity, and as Liquidating Agent for UNION BANK AND TRUST,

Defendant.

No. 92-C-2[illegible]-B

STIPULATION OF DISMISSAL WITHOUT PREJUDICE

COME NOW the Plaintiffs, RANDY AND JANET MUNINGER, and hereby dismiss without prejudice this action. In accordance with Rule 41(a)(1)(ii) of the Federal Rules of Civil Procedure, the Defendant, by and through its attorneys of record, has signed this Stipulation of Dismissal.

JOHNNY P. AKERS
Suite 214, 401 S. Dewey Street
Bartlesville, OK 74005

ATTORNEYS FOR PLAINTIFFS

THOMAS L. VOGT, #10995
JONES, GIVENS, GOTCHER & BOGAN
15 East 5th Street, #3800
Tulsa, OK 74103
918/581-8200

ATTORNEYS FOR DEFENDANT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DEETTA HAWKINS,

Plaintiff,

vs.

BW/IP INTERNATIONAL, INC,

Defendant.

Case No. 94-C-839-B

ENTERED

DATE MAY 05 1995

ORDER FOR DISMISSAL WITH PREJUDICE

NOW ON this 4th day of May, 1995, the Court hereby enters an Order dismissing this Cause.

IT IS SO ORDERED.

S/ THOMAS R. BRETT

JUDGE OF THE DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

HYPERVISION, INC., Plaintiff,	)	
vs.	)	Case No. 94-C-737-K
DAVID NOSS and MYRIAD TECHNOLOGIES, INC., Defendants,	)	
MYRIAD TECHNOLOGIES, INC. Third Party Plaintiff,	)	
vs.	)	
JERRY BULLARD AND JIM NOEL, Third Party Defendants,	)	

ORDER

Now before the Court is Defendant and Third Party Plaintiff's, Myriad Technologies, Inc. ("Myriad"), Application for Attorney Fees. Myriad requests attorneys' fees pursuant to 35 U.S.C. § 285, Local Rule 54.2 and 78 O.S. § 89.

The Court entered an Order on November 1, 1994, accepting the Report and Recommendation of the United States Magistrate Judge ("the Report"), and, in addition, issued an injunction restraining Hypervision ("Plaintiff"), Jerry Bullard and Jim Noel ("Third Party Defendants"), and their employees, assigns, agents, and representatives from directly or indirectly engaging in any type of activity which might infringe upon the '198 Patent and/or which in any way makes use of the software used to operate either the

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Instavision or Hypervision systems. (*See* Docket #35, p. 15) The Report found Plaintiff and Third Party Defendants liable for patent infringement and misappropriation of trade secrets. The parties were prohibited from marketing the Hypervision process under any other name.

No appeal was taken by the parties against whom the Order was entered. On November 14, 1994, Myriad filed a motion for costs and an application for attorneys' fees, the latter of which is the subject of this Order.

The Court granted Plaintiff and Third Party Defendants' requested leave for withdrawal of counsel on November 29, 1994. Jerry Bullard, Third Party Defendant ("Bullard"), entered his appearance *pro se* on behalf of Hypervision, Inc. and for himself, individually. Counsel also entered appearance on behalf of Third Party Defendant, Jim Noel ("Noel").

An order taxing costs for Myriad against Plaintiff and Third Party Defendants in the amount of $923.75 was granted on February 1, 1995. Myriad's request for attorneys' fees of $18,033.00 is the sole issue which remains to be settled.

DISCUSSION

I. Failure to File Response

Myriad filed its application for attorneys' fees on November 14, 1994. Pursuant to Local Rule 54.2 of the District Court for the Northern District of Oklahoma, all responses to such an application must be filed within fifteen (15) days of the date of

filing. Plaintiff and Third Party Defendants were granted an extension until January 23, 1995 to respond to the Motion. Neither Plaintiff nor Bullard have filed a response to date. Local Rule 54.2(B) states, "[a]ny party failing to comply with this rule will be deemed to have waived the claim or any objection." Third Party Defendant Noel responded on January 17, 1995.

Accordingly, the Court awards Myriad reasonable attorney fees and finds Plaintiff and Bullard liable for such fees. The Court now concentrates on the actions and liability of Noel, who filed a timely response, to determine whether an award of attorneys' fees should be made also against him.

II. Attorney Fees in Patent Cases

Pursuant to 35 U.S.C. § 285 and 78 O.S. § 89, Myriad seeks an award of attorneys' fees for legal expenses incurred as a result of the Plaintiff's non-infringement suit. Myriad contends that Plaintiff's suit needlessly forced it to defend the validity of its '198 patent and file counterclaims to obtain an injunction to prohibit Plaintiff and Third Party Defendants from marketing the infringing system and to secure a finding of patent infringement and misappropriation of trade secret.

A. Legal Standard

Attorneys' fees are expressly allowed in patent cases pursuant to 35 U.S.C. § 285. The statute states, "[t]he court in exceptional cases may award reasonable attorney fees to the

prevailing party." The grant of attorneys' fees is a means of compensating the prevailing party when "the losing party's misconduct was so unfair and reckless as to make it unconscionable for the prevailing party to sustain the expense of counsel." Lam, Inc. v. Johns-Manville Corp., 668 F.2d 462, 476 (10th Cir. 1982), *citing* Q-Panel Co. v. Newfield, 482 F.2d 210, 211 (10th Cir. 1973).

The prevailing party does not have a right to attorneys' fees. Rather, such an award must "be the exception and not the rule." Q-Panel, 482 F.2d at 211. No award of attorneys' fees is authorized in patent cases, unless there exists some degree of willful misconduct on the part of the losing party. Plastic Container Corp. v. Continental Plastics, 515 F. Supp. 834, 856 (W.D. Okla 1980). Furthermore, "[a]n award of attorneys' fees, like an award of treble damages, is committed to the discretion of the trial court and may only be disturbed for abuse of discretion." Milgo Electronic v. United Bus. Communications, 623 F.2d 645, 667 (10th Cir. 1980).

First, this Court must determine the willfulness of the infringement. The burden of demonstrating willful and deliberate behavior rests upon Myriad and must be shown by clear and convincing evidence. Power Lift, Inc. v. Lang Tools, Inc., 774 F.2d 478, 482 (Fed. Cir. 1985). The court in T.A. Pelsue, 782 F. Supp. at 1498-99 (D. Colo. 1991), outlined the following elements to consider when making a determination of willfulness:

> (1) whether the infringers deliberately copied the idea or design of another;

(2) whether the infringers, when they knew of the other's patent protection, investigated the scope of the patent and formed a good-faith belief that it was invalid or that it was not infringed; and

(3) the infringers' behavior as parties to the litigation.

In explaining the standard for attorneys' fees in this context, the Tenth Circuit has stated, "In this Circuit we recognize as bases for an award of attorneys' fees either willful infringement or the assertion of sham or frivolous defenses that increase significantly the patent holder's legal expenses through unduly protracted litigation." Lam, 668 F.2d at 476, *citing* Q-Panel, 482 F.2d at 211.

If the Court finds that the parties' infringement was willful, the case may be deemed *exceptional* and the Court may justifiably award attorneys' fees to Myriad. "A finding that infringement was willful and deliberate may justify an award of attorneys' fees to the [prevailing party], . . . depending on the circumstances of a particular case." Milgo, 623 F.2d at 667. *See also*, T.A. Pelsue, 782 F. Supp. at 1500. If the infringement was willful, attorney fees *may* be allowed at the trial court's discretion. *See* Modine Manufacturing Co. v. Allen Group Inc., 14 USPQ 2d 1210, 1221 (1989) (Emphasis added).

Similarly, a finding of misappropriation of a trade secret may, but does not necessarily, justify an award of attorneys' fees. More than simple misappropriation is required. The relevant statute provides:

The court may award reasonable attorneys' fees to the prevailing party if:

1. A claim of misappropriation is made in bad faith; or

2. A motion to terminate an injunction is made or resisted in bad faith; or

3. Willful and malicious misappropriation exists.

78 O.S. § 89. In order to justify an award of attorneys' fees, the Court must find more than mere misappropriation.

B. Plaintiff and Third Party Defendant Bullard

As already indicated, the failure of these parties to respond appropriately demonstrates their waiver of any defense to the motion for attorneys' fees. However, it should be noted that the Record in this case provides a strong basis for such an award. Bullard's development and marketing of the infringing system, presents clear and convincing evidence of willful and deliberate intent. Having been hired as a consultant for the development of the data transmission system to be used with the INSTAVISION system, Bullard had detailed knowledge of the existence and scope of the '198 patent. Additionally, Bullard has not made a persuasive argument that he formed a *good-faith* belief in the patent's invalidity or that the Hypervision system did not infringe the '198 patent. Moreover, The development and marketing of the Hypervision system was a direct effort by Plaintiff and Bullard to undermine Myriad's economic interest in the Instavision system. There can be no question that such violation affected Myriad's proprietary interest in the Instavision system. The actions taken are of the nature which should be condemned and pronounced wrongful by honest and fair-minded persons. "[T]o be unconscionable . . any

willful act with respect to the matter in litigation which would be condemned and pronounced wrongful by honest and fair-minded men will be sufficient to make the hands of the plaintiff unclean and vest the trial court with discretion to award reasonable attorney's fees to the prevailing party." Plastic Container, 515 F. Supp. at 856.

C. Third-Party Defendant Noel

The Court has before it much less evidence about the actions and intentions of Third Party Defendant Noel than it has about the actions of Plaintiff and Bullard. In the motion seeking attorneys' fees, Myriad never alleges any acts of Noel that would rise to the level requiring him to be responsible for such fees. Only in its reply does Myriad focus on the actions of Noel. Myriad points out that Noel signed an agreement with Myriad which stated he would not use confidential information. Noel agreed that:

> [d]uring my employment with MTI [Myriad] and thereafter, I shall not, without prior written consent of MTI, disclose or use for my own or for any other person's benefit any trade secrets, processes or other confidential or proprietary information of MTI, technical or otherwise, acquired or developed by me or of which I may be made aware during my employment with MTI.

Despite this agreement, Noel then went to work for Plaintiff selling almost exclusively to former Myriad customers.

However, Myriad has not met the additional burden needed to show willfulness on the part of Noel. Noel's intentions have not been sufficiently set forth to merit this additional award. While he may have been involved in marketing the infringing system, Noel

clearly did not play as critical a role as Bullard in violating the patent rightrights at issue. In the view of this Court, the allegations made against Noel under these circumstances do not meet the requirement of the statute.

Additionally, Myriad seeks fees pursuant to 78 O.S. § 89 but again fails to meet the statutory requirement. In its Motion for Attorneys' Fees, Myriad provided no argument to show that Noel made a misappropriation claim in bad faith, moved to terminate an injunction in bad faith, or took place in willful and malicious misappropriation. Although Noel may have been involved in marketing the infringing system, it has not been established that his actions rose to the level of malicious misappropriation.

III. Amount of Fees

In its request for attorneys' fees, Myriad states it has been billed $18,033 for legal services. No objection has been filed as to the amount requested in fees. The Court has nevertheless reviewed the application for fees in order to assess their reasonableness. In reviewing these costs, the Court has found them to be reasonable.

IV. Conclusion

THEREFORE, Plaintiff and Third Party Defendant Bullard are hereby ordered to pay to Myriad reasonable attorney fees in the amount of $18,033.

IT IS SO ORDERED THIS 4 OF ~~APRIL~~ May, 1995

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MABLE PUTNAM,

Plaintiff,

vs.

DAVID THOMAS, M.D. and SPRINGER CLINIC, INC.,

Defendants.

No. 93-C-870-K

JUDGMENT

In accordance with the jury verdict rendered on May 4, 1995, entered in favor of the defendants David Thomas, M.D. and Springer Clinic, Inc., and against the plaintiff, Mable Putnam, judgment is hereby entered in favor of defendants on all claims.

ORDERED this 4 day of May, 1995.

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

SUHUYR SALEEM,

Plaintiff,

vs.

SHIRLEY S. CHATER, Commissioner, Social Security Administration,

Defendant.

No. 93-C-806-K

JUDGMENT

This matter came before the Court for consideration of the plaintiff's motion for an order of judgment, which is hereby granted. In accordance with the Order entered December 15, 1994,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is hereby entered for the defendant and against the plaintiff.

ORDERED this 4 day of May, 1995.

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

RONNIE LEE ARCHER,

Plaintiff,

vs.

BW/IP INTERNATIONAL, INC., a Delaware Corporation,

Defendant and Third Party Plaintiff,

vs.

SEBASTIAN EQUIPMENT COMPANY, a Missouri Corporation,

Third-Party Defendant

No. 94-C-553-K

ORDER

Now before the Court are the summary judgment motions of Defendant and Third Party Plaintiff BW/IP International ("BW/IP") and of Third Party Defendant Sebastian Equipment Company ("Sebastian"). The Plaintiff in this case, Ronnie Lee Archer ("Archer"), filed his Complaint on May 27, 1994, alleging negligence against BW/IP for injuries sustained while delivering goods to BW/IP's place of business on or about April 27, 1993. Archer was delivering goods pursuant to a contract between BW/IP and Sebastian.

In December of 1994, BW/IP filed a Third Party Complaint against Sebastian arguing that Sebastian is contractually obligated to defend and save BW/IP harmless for damages suffered by Archer. The Court has previously approved Archer's Motion to Dismiss its

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Complaint against BW/IP. However, this decision specifically left unresolved the dispute arising under the Third Party Complaint filed by BW/IP. Therefore, a dispute remains regarding whether an indemnity contract was formed between BW/IP and Sebastian.

I. Facts

BW/IP claims that it entered into an Open Purchase Order Agreement with Sebastian on December 22, 1992 that provided for a term of one-year blanket usage. BW/IP has submitted a copy of the alleged contract. Numerical paragraph number 8 of the Purchase Order Agreement allegedly entered into by both parties provides that:

> Liability Seller shall defend and save Purchaser harmless from all liability and expense for loss or damage to property and for injury or death of persons occurring during the term of this order or arising out of or in any way relating to the performance of this contract by Seller, except for any liability or expense for such loss or damage to property or injury or death of persons arising out of or in anyway relating to the gross negligence of the Purchaser, its agents and employees or of third parties.

Def.'s Br. for Summ. J., Exh. A.

Sebastian, on the other hand, states that it never entered into such a contract and that it never received or saw the language that BW/IP claims was printed on the reverse side of the Open Purchase Order Agreement. At most, Sebastian claims that the parties only agreed to an oral contract to provide and deliver certain equipment from Sebastian to BW/IP without any indemnity agreement. Assuming *arguendo* that the indemnity contract is enforceable between the parties, Sebastian says that an issue of

fact precluding summary judgment for BW/IP exists. This issue concerns whether the negligence complained of was gross negligence and thus not covered by the contract.

II. Summary Judgment Standard

Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "there is no genuine issue as to any material fact" and "the moving party is entitled to judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265, 274 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986); Windon Third Oil and Gas v. Federal Deposit Insurance Corporation, 805 F.2d 342, 345 (10th Cir. 1986), cert den. 480 U.S. 947 (1987). In Celotex, 477 U.S. at 322 (1986), it is stated:

> "[T]he plain language of Rule 56 (c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."

A party opposing a properly supported motion for summary judgment may not rest upon mere allegations or denials of his pleadings, but must affirmatively prove specific facts showing there is a genuine issue of material fact for trial. In Anderson v. Liberty Lobby, Inc., the Court stated:

> The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.

477 U.S. at 252. The Tenth Circuit requires "more than pure speculation to defeat a motion for summary judgment" under the standards set by Celotex and Anderson. Setliff v. Memorial Hospital of Sheridan County, 850 F.2d 1384, 1393 (10th Cir. 1988).

III. Discussion

The foremost question in this case is whether BW/IP and Sebastian agreed to the indemnity provision of the Purchase Order Agreement quoted above. Both parties have moved for summary judgment on this question. BW/IP asks this Court to determine that Sebastian is bound by the indemnity language in the contract while Sebastian asks this Court to reach the opposite conclusion. The Purchase Order Agreement states that California law should govern the interpretation of the contract. However, the issue in this case at the outset is whether the Agreement created a contract at all. Thus, the Agreement's bindingness as a contract should be analyzed under Oklahoma law, since it was created and signed by employees of BW/IP in Tulsa, Oklahoma. Okla. Stat. tit. 12A O.S. § 1-105. However, the choice of law is ultimately irrelevant, because all the provisions discussed in this Order, including the choice of law provision, are the same in Oklahoma and California. See Cal. Com. Code § 1105

It is undisputed that no employee at Sebastian ever signed the Purchase Order Agreement. Only, an employee of BW/IP signed the document. However, the Commercial Code of Oklahoma and of California allows an agreement between merchants under certain

circumstances to be enforced absent such a signing by the party against whom the agreement is to be enforced. Under the law of either state, the commercial code states:

> Between merchants if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know of its contents, it satisfies the requirements of subsection (1) against such party unless written notice of objection to its contents is given within ten days after it is received.

Okla. Stat. tit. 12A O.S. § 2-201; Cal. Com. Code § 2201(2). This provision, known as the confirmatory memorandum proviso, is an exception to the general requirement set forth in subsection (1) of § 2-201 that in contracts for the sale of goods over $500, there must be some writing signed by the party against whom enforcement is sought. The provision allows a writing not signed by the party against whom enforcement is sought to satisfy the statute of frauds.

The dispute, at its core, involves the question of the existence and receipt of a confirmatory writing.[1] The parties in their briefs focus on the issue of whether Sebastian received BW/IP's Purchase Order Agreement. However, this Court will address the issue of receipt of that document as well as whether the document properly qualifies as a confirmatory memorandum under § 2-201 of the Commercial Code. While there is a question of fact as to receipt of the Purchase Order Agreement, no issue of fact exists as to whether the Purchase Order Agreement constitutes a

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[1] In its Reply Brief, BW/IP states that the Commercial Code governs the issues to be decided in this case. Def.'s Reply Br., at p.2, n.2.

confirmatory memo.

A presumption of receipt of a confirmatory memo arises if it is shown that the sender has an office custom of mailing documents like the agreement in question in this case. Ronald A. Anderson, 2 Uniform Commercial Code § 2-201:140 (1982). A sending party need not present direct proof that the procedure was followed in the particular instance. Id. Although the Commercial Code does not prescribe any method for proving receipt, a presumption of receipt arises when it is established that the confirmatory writing has been properly mailed. Id at § 2-201:141. However, this is a rebuttable presumption and may be overcome by evidence that the writing was not received. Id. Given the affidavit of the President of Sebastian, Greg Scheurich, in which he states that no such document was received, the issue of receipt is one of fact and would be appropriate for a jury to resolve. Farmers ins. Exchange v. Taylor, 193 F.2d 756 (10th Cir. 1952); Tremayne v. American SMW Corp., 271 P.2d 229, 230 (Cal. App. 1954).

However, while the parties have focussed on the issue of receipt, there is a more fundamental question to be resolved. Namely, this Court must determine whether the Purchase Order Agreement allegedly sent to Sebastian can be understood under the Commercial Code as a confirmatory memo.

The written confirmation exception to the statute of frauds is satisfied only when a writing is in confirmation of a prior oral contract. The statute provides a procedure to allow an oral contract to ripen into a binding contract. Thus, a confirmation

cannot exist without the existence of a prior oral agreement or, at the least, negotiations involving the subject of the confirmatory memorandum. See Trilco Terminal v. Prebilt Corp., 400 A.2d 1237 (N.J. Super. Ct. Law Div. 1979), aff'd, 415 A.2d 356 (N.J. Super. 1980). Some evidence of a prior discussion or oral agreement concerning liability or indemnification of BW/IP for negligence is necessary for this purchase order to serve as a confirmatory memorandum on these issues. Although BW/IP may have had an ongoing relationship with Sebastian from 1991 until December, 1993, its past use of purchase order agreements does not demonstrate an oral indemnification contract. BW/IP does not cite or allege any discussions or negotiation between the parties in which the topic of indemnification or liability was raised. BW/IP has presented no evidence that the parties exhibited the requisite consent pursuant to 15 O.S. § 2 and common law contract principles to form a contract on indemnification or liability.

Additionally, the Purchase Order Agreement does not indicate in any way that it is in *confirmation* of a prior oral agreement, even if such an agreement had been reached at some point. Perdue Farms, Inc. v. Motts, Inc. of Mississippi, 459 F. Supp. 7 (N.D. Miss. 1978). It does not use such terms as "in confirmation of" or "as per our conversation" or refer to any prior transaction in any manner. Although explicit words of confirmation are not always required, the writing should make it clear to the recipient that a prior agreement is relied upon. Trilco, 400 A.2d at 1240; Howard Constr. Co. v. Jeff-Cole Qarries, Inc., 669 S.W.2d 221, 227-230

(Mo. Ct. App. 1983). If viewed as anything more than a routine purchasing order, the document submitted by BW/IP is ambiguous and confusing and therefore should only be construed as a purchasing order, absent the indemnity provision. Trilco, 400 A.2d at 1241. The Purchase Order Agreement does not refer to any prior discussion of indemnity between the parties and cannot be held to confirm a previously discussed indemnification contract. Even if specific words of confirmation are not required, a purchase order alone is unlikely to meet the test under § 2-201. Bazak International Corp. v. Mast Industries, Inc., 73 N.Y.2d 113, 120-121 (N.Y. 1989).

BW/IP states that it had an ongoing relationship with Sebastian in which BW/IP would purchase goods through the use of purchase order forms. Even if the parties had an oral contract to purchase tools pursuant to a purchase order form, the liability clause at paragraph 8 is a significant and material alteration of that type of contract. Indemnification for all negligence short of gross negligence adds a substantial new factor to an oral contract to purchase tools. Although terms added to an acceptance do not invalidate a contract under § 2-207 of the Commercial Code, the exception to the statute of frauds established at § 2-201 is distinct and subject to different limitations. Anderson, 2 Uniform Commercial Code, § 2-201:126; Okla. Stat. tit. 12A. O.S. § 2-207. While § 2-207 under Oklahoma and California law is designed to eliminate the problems raised by conflicting terms in competing offers and acceptances, the confirmatory memorandum serves to carve out an exception to the statute of frauds. Therefore, the

liability terms of the Purchase Order Agreement cannot by operation of §2-207 be incorporated into a contract under the confirmatory memorandum provision.

In light of the fact that the Purchase Order Agreement is not a confirmatory memo concerning indemnification or liability, it cannot escape the statute of frauds. The Purchase Order Agreement therefore cannot be held to be binding on Sebastian. Additionally, BW/IP has presented no evidence of any type of oral indemnity contract between the parties concerning indemnification for injuries arising out of deliveries pursuant to the Purchase Order Agreement.

IV. Conclusion

For the reasons discussed above, the motion for summary judgment by Third Party Defendant Sebastian is granted. The motion for summary judgment by Defendant and Third Party Plaintiff BW/IP is denied.

ORDERED this 4 day of May, 1995.

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff, vs. ZANDRA SULTAN; UNKNOWN SPOUSE OF Zandra Sultan, if any; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, Defendants.	)	Civil Case No. 94-C-1182K

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 3 day of May, 1995. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, appear by Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma; and the Defendants, ZANDRA SULTAN and UNKNOWN SPOUSE OF Zandra Sultan, if any, appear not, but make default.

The Court further finds that the Defendants, ZANDRA SULTAN and UNKNOWN SPOUSE OF Zandra Sultan, if any, were served by publishing notice of this action in the Tulsa Daily Commerce & Legal News, a newspaper of general circulation in Tulsa County, Oklahoma, once a week for six (6) consecutive weeks beginning February 17, 1995, and continuing through March 24, 1995, as more fully appears from the verified proof of publication duly filed herein; and that this action is one in which service by publication is

NOTE: THIS ORDER IS TO BE MAILED BY MOVANT TO ALL COUNSEL AND PRO SE LITIGANTS IMMEDIATELY UPON RECEIPT.

authorized by 12 O.S. Section 2004(c)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendants, ZANDRA SULTAN and UNKNOWN SPOUSE OF Zandra Sultan, if any, and service cannot be made upon said Defendants within the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendants without the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known addresses of the Defendants, ZANDRA SULTAN and UNKNOWN SPOUSE OF Zandra Sultan, if any. The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America, acting through the Department of Housing and Urban Development, and its attorneys, Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the parties served by publication with respect to their present or last known places of residence and/or mailing addresses. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendants served by publication.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answers on January 10, 1995; that the Defendants, ZANDRA SULTAN and UNKNOWN SPOUSE OF Zandra Sultan, if any, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

Lot Seven (7), Block Nineteen (19), CARBONDALE, now an Addition to the City of Tulsa, Tulsa County, State of Oklahoma, according to the recorded Plat thereof.

The Court further finds that on September 30, 1986, Lois Elaine Crawford, executed and delivered to FIRST SECURITY MORTGAGE COMPANY, her mortgage note in the amount of $38,707.00, payable in monthly installments, with interest thereon at the rate of Ten percent (10%) per annum.

The Court further finds that as security for the payment of the above-described note, Lois Elaine Crawford, a single person, executed and delivered to FIRST SECURITY MORTGAGE COMPANY, a mortgage dated September 30, 1986, covering the above-described property. Said mortgage was recorded on October 7, 1986, in Book 4974, Page 1973, in the records of Tulsa County, Oklahoma.

The Court further finds that on March 23, 1987, FIRST SECURITY MORTGAGE COMPANY, assigned the above-described mortgage note and mortgage to MORTGAGE CLEARING CORPORATION. This Assignment of Mortgage was recorded on April 2, 1987, in Book 5012, Page 1563, in the records of Tulsa County, Oklahoma.

The Court further finds that on September 1, 1989, Mortgage Clearing Corporation, assigned the above-described mortgage note and mortgage to Secretary of Housing and Urban Development. This Assignment of Mortgage was recorded on September 6, 1989, in Book 5205, Page 1281, in the records of Tulsa County, Oklahoma.

The Court further finds that on October 18, 1987, Lois Elaine Crawford, a single person, granted a general warranty deed to Zandra Sultan, a single person. This deed was recorded with the Tulsa County Clerk on November 12, 1987, in Book 5063 at Page 0945 and the Defendant, ZANDRA SULTAN, assumed thereafter payment of the amount due pursuant to the note and mortgage described above.

The Court further finds that on August 16, 1989, the Defendant, ZANDRA SULTAN, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose.

The Court further finds that the Defendant, ZANDRA SULTAN, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreement, by reason of her failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendant, ZANDRA SULTAN, is indebted to the Plaintiff in the principal sum of $60,162.93, plus interest at the rate of 10 percent per annum from November 1, 1994 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of ad valorem taxes in the amount of $339.00, plus penalties and interest, for the year of 1994. Said lien is superior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of $18.00 which became a lien on the property as of June 26, 1992, a lien in the amount of $15.00 which became a lien on the

property as of June 25, 1993, and a lien in the amount of $15.00 which became a lien on the property as of June 23, 1994. Said liens are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendants, ZANDRA SULTAN and UNKNOWN SPOUSE OF Zandra Sultan, if any, are in default, and have no right, title or interest in the subject real property.

The Court further finds that the Defendant, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, claims no right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment In Rem against the Defendant, ZANDRA SULTAN, in the principal sum of $60,162.93, plus interest at the rate of 10 percent per annum from November 1, 1994 until judgment, plus interest thereafter at the current legal rate of 6.28 percent per annum until paid, plus the costs of this action, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, have and recover judgment in the amount of $339.00, plus penalties and interest, for ad valorem taxes for the year 1994, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, have and recover judgment in the amount of $48.00, plus costs and interest, for personal property taxes for the years 1991-1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, ZANDRA SULTAN and UNKNOWN SPOUSE OF Zandra Sultan, if any, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendant, ZANDRA SULTAN, to satisfy the judgment In Rem of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of $339.00, plus penalties and interest, for ad valorem taxes which are presently due and owing on said real property;

Third:

In payment of the judgment rendered herein in favor of the Plaintiff;

Fourth:

In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of $48.00, personal property taxes which are currently due and owing.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

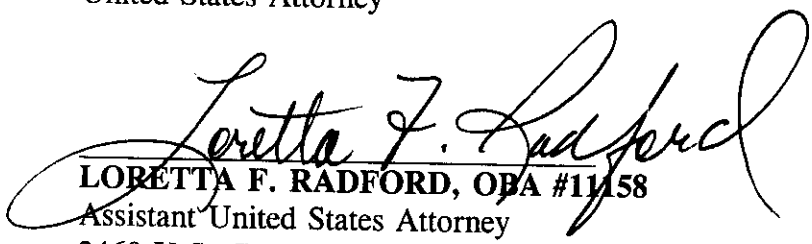
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

s/ TERRY C. KERN

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney



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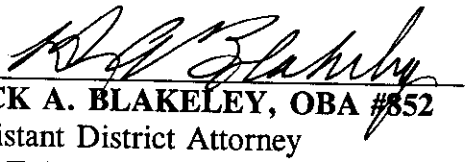

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Attorney for Defendants,
County Treasurer and
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Tulsa County, Oklahoma

Judgment of Foreclosure
Civil Action No. 94-C-1182-K

LFR:flv

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WENDELL H. CRAWFORD
EMMA A. CRAWFORD;
SHERRY D. WOODSON;
SUZY L. CRAWFORD;
STATE OF OKLAHOMA, ex rel.
OKLAHOMA TAX COMMISSION;
COUNTY TREASURER, Tulsa County,
Oklahoma;
BOARD OF COUNTY COMMISSIONERS,
Tulsa County, Oklahoma

Defendants.

CIVIL ACTION NO. 94-C-302-B

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 3rd day of May, 1994. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Neal B. Kirkpatrick, Assistant United States Attorney; the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, appear by Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma; the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, appears by Kim D. Ashley, Assistant General Counsel; The Defendant, EMMA A. CRAWFORD, appears by her attorney, John M. Gerkin, Esq.; and the Defendants, WENDELL H. CRAWFORD, SUZY L. CRAWFORD and SHERRY D. WOODSON, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, WENDELL H. CRAWFORD, was served with process a copy of Summons and Complaint on July 28, 1994; that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, acknowledged receipt of Summons and Complaint on April 4, 1994; that the Defendant, SUZY L. CRAWFORD, was served a copy of Summons and Complaint on August 30, 1994, by Certified Mail; that Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on April 8, 1994; and that Defendant, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, acknowledged receipt of Summons and Complaint on March 31, 1994.

The Court further finds that the Defendant, SHERRY D. WOODSON, was served by publishing notice of this action in the Tulsa Daily Commerce & Legal News, a newspaper of general circulation in Tulsa County, Oklahoma, once a week for six (6) consecutive weeks beginning October 13, 1994, and continuing through November 17, 1994, as more fully appears from the verified proof of publication duly filed herein; and that this action is one in which service by publication is authorized by 12 O.S. Section 2004(c)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendant, SHERRY D. WOODSON, and service cannot be made upon said Defendant within the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendant without the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known address of the Defendant, SHERRY D. WOODSON. The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based

upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America, acting through the Department of Housing and Urban Development, and its attorneys, Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Neal B. Kirkpatrick, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the party served by publication with respect to her present or last known place of residence and/or mailing address. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendant served by publication.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answers on April 25, 1994; that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, filed its Answer on April 25, 1994; and that the Defendants, WENDELL H. CRAWFORD, SUZY L. CRAWFORD and SHERRY D. WOODSON, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that on August 12, 1987, Wendell H. Crawford and Emma A. Crawford filed their voluntary petition in bankruptcy in the United States Bankruptcy Court, Northern District of Oklahoma, Case No. 87-B-2193. On December 15, 1987, the United States Bankruptcy Court for the Northern District of Oklahoma Discharged the bankruptcy and it was subsequently closed on May 9, 1988.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described

real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

Lot Twenty-five (25), Block One (1), SANS SOUCI to the City of Tulsa, County of Tulsa, State of Oklahoma, according to the recorded Plat thereof.

The Court further finds that on July 11, 1986, the Defendant, SHERRY D. WOODSON, executed and delivered to Turner Corporation of Oklahoma, Inc., a mortgage note in the amount of $63,421.00, payable in monthly installments, with interest thereon at the rate of Nine and One-Half percent (9.5%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendant, SHERRY D. WOODSON, executed and delivered to Turner Corporation of Oklahoma, Inc., a mortgage dated July 11, 1986, covering the above-described property. Said mortgage was recorded on July 14, 1986, in Book 4955, Page 1030, in the records of Tulsa County, Oklahoma.

The Court further finds that on January 4, 1989, Turner Corporation of Oklahoma, Inc., assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development. This Assignment of Mortgage was recorded on January 6, 1989, in Book 5159, Page 2680, in the records of Tulsa County, Oklahoma.

The Court further finds that on August 31, 1987, the Defendant, SHERRY D. WOODSON, granted a general warranty deed to the Defendants, WENDELL H. CRAWFORD and EMMA A. CRAWFORD. This deed was recorded with the Tulsa County Clerk on September 29, 1987, in Book 5054 at Page 2350, and the Defendants, WENDELL H. CRAWFORD and EMMA A. CRAWFORD assumed thereafter payment of the amount due pursuant to the note and mortgage described above.

The Court further finds that on January 1, 1989, the Defendants, WENDELL H. CRAWFORD and EMMA A. CRAWFORD, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. Superseding agreements were reached between these same parties on January 1, 1990, and March 1, 1991.

The Court further finds that the Defendants, WENDELL H. CRAWFORD and EMMA A. CRAWFORD, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, WENDELL H. CRAWFORD and EMMA A. CRAWFORD, are indebted to the Plaintiff in the principal sum of $95,987.80, plus interest at the rate of Nine and One-Half percent per annum from January 1, 1994 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action in the amount of $81.00 fees for service of Summons and Complaint.

The Court further finds that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, has a lien on the property which is the subject matter of this action by virtue of state taxes in the amount of $1,390.55 which became a lien on the property as of November 28, 1988. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendants, WENDELL H. CRAWFORD, SUZY L. CRAWFORD and SHERRY D. WOODSON, are in default, and have no right, title or interest in the subject real property.

The Court further finds that the Defendants, COUNTY TREASURER and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, claim no right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment In Rem against the Defendants, WENDELL H. CRAWFORD and EMMA A. CRAWFORD, in the principal sum of $95,987.80, plus interest at the rate of Nine and One-Half percent per annum from January 1, 1994 until judgment, plus interest thereafter at the current legal rate of 6.28 percent per annum until paid, plus the costs of this action in the amount of $81.00 fees for service of Summons and Complaint, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, have and recover judgment In Rem in the amount of $1,390.55, plus accrued and accruing interest, costs and penalties for state taxes for the years 1984-1987, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, COUNTY TREASURER and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, WENDELL H. CRAWFORD, SUZY L. CRAWFORD,

SHERRY D. WOODSON, and EMMA A. CRAWFORD, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, WENDELL H. CRAWFORD and EMMA A. CRAWFORD, to satisfy the judgment In Rem of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:
In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:
In payment of the judgment rendered herein in favor of the Plaintiff;

Third:
In payment of Defendant, STATE OF OKLAHOMA, ex rel, OKLAHOMA TAX COMMISSION in the amount of $1,390.55, state taxes which are currently due and owing, plus accrued and accruing interest.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any

right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

APPROVED:

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Judgment of Foreclosure
Civil Action No. 94-C-302-B

LFR:flv

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WILLIAM A. BROONER, JR.; THERESA G. BROONER; AMERICAN GENERAL FINANCE, INC.; CITY OF SAPULPA, Oklahoma; COUNTY TREASURER, Creek County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Creek County, Oklahoma,

Defendants.

Civil Case No. 93-C-727-K

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 1 day of May, 1995. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the Defendants, COUNTY TREASURER, Creek County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Creek County, Oklahoma, appear not having previously filed a Disclaimer; and the Defendants, WILLIAM A. BROONER, JR., THERESA G. BROONER, AMERICAN GENERAL FINANCE, INC., and CITY OF SAPULPA Oklahoma, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, WILLIAM A. BROONER, JR., was served with process a copy of Summons and Complaint on February 23, 1995; that the Defendant, THERESA G. BROONER, was served a copy of Summons and Complaint on February 23, 1995; that the Defendant, AMERICAN

1993, by Certified Mail; that Defendant, CITY OF SAPULPA, Oklahoma, acknowledged receipt of Summons and Complaint on August 16, 1993.

It appears that the Defendants, COUNTY TREASURER, Creek County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Creek County, Oklahoma, filed their Disclaimer on August 18, 1993; and that the Defendants, WILLIAM A. BROONER, JR., THERESA G. BROONER, AMERICAN GENERAL FINANCE, INC., and CITY OF SAPULPA Oklahoma, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Creek County, Oklahoma, within the Northern Judicial District of Oklahoma:

A tract of land in the West Half of the Northeast Quarter (W½ NE¼) of Section Two (2), Township Seventeen (17) North, Range Eleven (11) East, in Creek County, State of Oklahoma, according to the United States Government Survey thereof and more particularly described as follows: BEGINNING at a point 1212.33 feet North of the Southwest Corner thereof; THENCE East 175 feet; THENCE North 88 feet' THENCE West 175 feet; THENCE South 88 feet to the point of beginning.

The Court further finds that on May 5, 1983, the Defendant, William A. Brooner and Mary L. Brooner, then husband and wife, executed and delivered to REALBANC, INC., a mortgage note in the amount of $24,900.00, payable in monthly installments, with interest thereon at the rate of Twelve percent (12%) per annum.

REALBANC, INC., a mortgage note in the amount of $24,900.00, payable in monthly installments, with interest thereon at the rate of Twelve percent (12%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendant, WILLIAM A. BROONER and MARY L. BROONER, then husband and wife, executed and delivered to REALBANC, INC., a mortgage dated May 5, 1983, covering the above-described property. Said mortgage was recorded on May 11, 1983, in Book 137, Page 258, in the records of Creek County, Oklahoma.

The Court further finds that on June 6, 1988, FIRSTIER MORTGAGE CO., formerly Realbanc, Inc., assigned the above-described mortgage note and mortgage to Leader Federal Savings and Loan Association. This Assignment of Mortgage was recorded on April 24, 1989, in Book 239, Page 1779, in the records of Creek County, Oklahoma.

The Court further finds that on March 29, 1989, Leader Federal Savings and Loan Association, assigned the above-described mortgage note and mortgage to The Secretary of Housing and Urban Development, his successors and assigns. This Assignment of Mortgage was recorded on March 29, 1989, in Book 247, Page 70, in the records of Creek County, Oklahoma.

The Court further finds that on March 1, 1989, the Defendant, WILLIAM A. BROONER, JR., and the Defendant, THERESA G. BROONER, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. Superseding agreements were reached between these same parties on June 1, 1991 and February 1, 1992.

The Court further finds that the Defendant, WILLIAM A. BROONER, JR., made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of his failure to make the monthly

installments due thereon, which default has continued, and that by reason thereof the Defendant, WILLIAM A. BROONER, JR., is indebted to the Plaintiff in the principal sum of $33,355.76, plus interest at the rate of 12 percent per annum from April 19, 1993 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendants, WILLIAM A. BROONER, JR., THERESA G. BROONER, AMERICAN GENERAL FINANCE, INC., and CITY OF SAPULPA Oklahoma, are in default, and have no right, title or interest in the subject real property.

The Court further finds that the Defendants, COUNTY TREASURER and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, Disclaim any right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment against the Defendant, WILLIAM A. BROONER, JR., in the principal sum of $33,355.76, plus interest at the rate of 12 percent per annum from April 19, 1993 until judgment, plus interest thereafter at the current legal rate of 6.78 percent per annum until paid, plus the costs of this action, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, COUNTY TREASURER and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, WILLIAM A. BROONER, JR., THERESA G. BROONER, AMERICAN GENERAL FINANCE, INC., and CITY OF SAPULPA Oklahoma, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendant, WILLIAM A. BROONER, JR., to satisfy the judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

s/ TERRY C. KERN
UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney

LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
3460 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

Judgment of Foreclosure
Civil Action No. 93-C-727-K

LFR:flv

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

LINCO-ELECTROMATIC, INC., a Texas corporation,

Plaintiff,

v.

EDECO, INC., an Oklahoma corporation, and EDECO ENGINEERS, INC., an Oklahoma corporation,

Defendants.

Case No. 95-C-164-B

AGREED JUDGMENT

This matter comes on for consideration on the 2nd day of May, 1995. The Court, having reviewed the file, having been informed by the parties that they agree to the entry of this Judgment, and being fully advised in the premises, finds that judgment should be entered in favor of the Plaintiff, Linco-Electromatic, Inc., and against the Defendants, Edeco, Inc. and Edeco Engineers, Inc., jointly and severally, on the claims set forth in Plaintiff's Complaint herein in the amount of $81,934.82 together with interest thereon at the rate of 12% per annum from September 21, 1994, costs in the amount of $353.50 and a reasonable attorney fee in the amount of $2,717.50.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is granted in favor of the Plaintiff, Linco-Electromatic, Inc., and against the Defendants, Edeco, Inc. and Edeco Engineers, Inc., jointly and severally, in the amount of $81,934.82 with interest thereon at the rate of 12% per annum from September 21, 1994 until

paid, costs incurred in connection with this action in the amount of $353.50, and a reasonable attorney fee in the amount of $2,717.50, for all of which let execution issue.

DATED this 2nd day of ~~April~~ May, 1995.

Thomas R. Brett

APPROVED:

Ryan S. Wilson
Kurt M. Rupert
HARTZOG CONGER & CASON
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201 Robert S. Kerr
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ATTORNEYS FOR PLAINTIFF,
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ATTORNEY FOR DEFENDANTS

KMR/5smP3703.JUD

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

CHUBB SOVEREIGN LIFE INSURANCE COMPANY,

Plaintiff,

vs.

GRACE JACOBUS, JIMMY N. YANCEY, individually and as Administrator of the ESTATE OF MICHAEL D. YANCEY, Deceased, and MOLLY LANETTE YANCEY,

Defendants.

Case No. 94-C-950-H

AGREED FINAL JUDGMENT

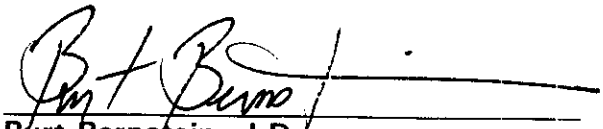
By agreement of the parties and for good cause shown, the Court determines that there is no just reason for delay, and therefore directs the entry of final judgment pursuant to Fed. R. Civ. P. 54(b) in favor of plaintiff, Chubb Sovereign Life Insurance Company ("Chubb") as follows. Chubb is granted final judgment on its interpleader action against all other parties herein. Chubb is discharged as a party and is also discharged from further liability in this action and any claims relating to the proceeds which have been tendered into the registry of this Court herein. Pursuant to 28 U.S.C. § 2361 and Fed. R. Civ. P. 65, the defendants are permanently enjoined from instituting or prosecuting any proceeding in any state or United States court affecting the property or obligation involved in this action. Chubb shall bear its own costs and attorney's fees in this action. This Court retains jurisdiction over the remaining claims by the other parties herein.

S/ SVEN ERIK HOLMES

SVEN ERIK HOLMES
UNITED STATES DISTRICT COURT JUDGE

AGREED:

CHUBB SOVEREIGN LIFE INSURANCE COMPANY



Burt Bernstein, J.D.
Vice President
Chubb Sovereign Life Insurance Company
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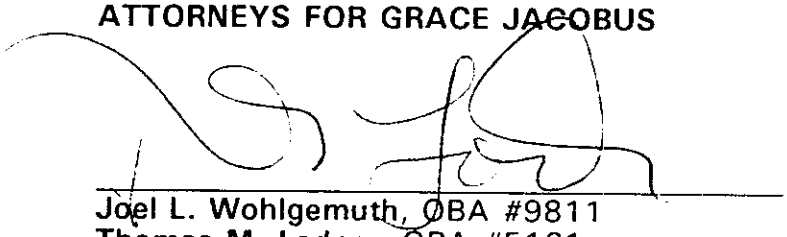
ATTORNEYS FOR GRACE JACOBUS



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ATTORNEYS FOR JIMMY N. YANCEY, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF MICHAEL D. YANCEY, DECEASED, and MOLLY LANETTE YANCEY

yancey.agreed/mdc

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

CHUBB SOVEREIGN LIFE INSURANCE COMPANY

Plaintiff,

v.

GRACE JACOBUS, JIMMY N. YANCEY, individually and as Administrator of the ESTATE OF MICHAEL D. YANCEY, Deceased and MOLLY LANETTE YANCEY,

Defendants.

ENTERED ON DOCKET
DATE MAY 0 3 1995

No. 94-C-950-H

FILED
MAY 0 2 1995
Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

O R D E R

Before the Court for consideration is the motion for partial summary judgment by Defendant Grace Jacobus ("Jacobus"). First, Jacobus seeks a determination that Michael D. Yancey, the insured under life insurance policy number 263119 (formerly numbered as policy number 252226) (the "Policy") issued by Chubb Sovereign Life Insurance Company ("Chubb Sovereign") and the former husband of Jacobus, designated her as irrevocable beneficiary under the Policy and that she continued as the irrevocable beneficiary under the Policy until Yancey's death. Second, Jacobus seeks a determination that Section 178 of title 15 of the Oklahoma Statutes does not, as a matter of law, affect that designation.

Chubb Sovereign commenced this interpleader action on October 11, 1994 requesting that the Court determine which party, either Jacobus or the estate of the deceased (in effect, the parents of the Insured, Jimmy and Molly Yancey) (collectively, the "Yancey

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Defendants"), is entitled to the proceeds of the Policy. Chubb Sovereign has deposited the proceeds of the Policy with the Court pending the outcome of the action.

The following facts are not in dispute. On August 24, 1988, Chubb Sovereign issued the Policy in the face amount of $750,000.00 covering the life of Michael D. Yancey (the "Insured" or "Yancey"). The Policy, as originally issued, lacked a beneficiary designation. The Insured amended the Policy on September 14, 1988, adding a beneficiary designation. The Insured designated the primary beneficiary to be "Grace Yancey, Wife of the Insured, Irrevocable."

In September 1992, the Insured moved out of the residence that he had previously shared with Jacobus, located at 14621 E. 15th Place, Tulsa, OK, 74104. On September 14, 1992, Yancey filed a petition for divorce in Tulsa County District Court. On March 24, 1994, Jacobus and Yancey signed a divorce decree and filed it in Tulsa County District Court. The decree awarded Yancey "free and clear of any right, claim and interest of [Jacobus] . . . all personal property in [Yancey's] possession. . . ."

On October 29, 1992, Chubb Sovereign received a partially completed beneficiary designation form apparently executed by Yancey. The first section of the form is entitled "BENEFICIARY" and the form directed Yancey to "Print full names and relationship to Insured. If a corporation, state where incorporated." This section was left blank. The next section of the form is entitled

"CONTINGENT BENEFICIARY".[1] In that section, the words "JIMMY N. YANCEY - FATHER" and "M. LANETTE YANCEY - MOTHER" were typed.

By letter dated November 13, 1992 and February 22, 1993, Chubb Sovereign attempted to return the partially completed beneficiary designation form to Yancey. Chubb Sovereign advised its Insured that it could not accept the form unless the primary beneficiary section of the designation was completed. The second letter was stamped with a notice stating "SECOND REQUEST, IF REQUIREMENTS ARE NOT RECEIVED WITHIN 10 DAYS WE ASSUME YOU DO NOT WISH TO MAKE THIS CHANGE AT THIS TIME." These letters were sent via first class mail to Yancey's attention at his former East 15th Place residence. The Yancey Defendants claim that he never received the letters because Yancey moved to another residence in mid-September of 1992. The letters were not returned to Chubb Sovereign, and the Yancey Defendants assert that Yancey's files did not contain copies of the letters at the time of his death and that Jacobus' files did contain copies of the letters.

The Insured died on June 19, 1994. Jacobus then submitted a proof of death statement, dated June 29, 1994, to Chubb Sovereign claiming the proceeds of the Policy. Chubb Sovereign received notice on June 24, 1994 that Yancey's estate intended to contest Jacobus' receipt of the proceeds. Chubb Sovereign has tendered the

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[1] Directly above the "CONTINGENT BENEFICIARY" section, the form advises that "[i]f more than one beneficiary is named, then in equal shares to the survivors, unless otherwise indicated. If there is no survivor, then to the contingent beneficiary."

benefits payable under the Policy as a result of Yancey's death into the registry of this Court.

Summary judgment is appropriate where "there is no genuine issue as to any material fact," Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Windon Third Oil & Gas Drilling Partnership v. Federal Deposit Insurance Corp., 805 F.2d 342, 345 (10th Cir. 1986), cert. denied, 480 U.S. 947 (1987), and "the moving party is entitled to judgment as a matter of law," Fed. R. Civ. P. 56(c). In Celotex, the Supreme Court stated:

> [t]he plain language of Rule 56 (c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

477 U.S. at 322.

A party opposing a properly supported motion for summary judgment must offer evidence, in admissible form, of specific facts, Fed. R. Civ. P. 56(e), sufficient to raise a "genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In Anderson, the Supreme Court stated:

> [t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.

477 U.S. at 252. Thus, to defeat a summary judgment motion, the nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-86 (1986).

The parties agree that Jacobus was designated as the primary irrevocable beneficiary of the Policy on September 14, 1988. The first question before the Court is whether the incomplete form which Chubb Sovereign received effected a change in that beneficiary designation.

An insurance policy is a contract and should be interpreted as such. Short v. Oklahoma Farmers Union Ins. Co., 619 P.2d 588, 589 (Okl. 1980). The terms and conditions of the Policy must, in the first instance, govern the parties' dispute. The Policy unambiguously instructs the Insured as to how to designate a new beneficiary:

> You may change a beneficiary by filing a written notice with us. A change of beneficiary will not be effective until recorded by us at our Home Office. When recorded, even if the Insured is not then living, the change will take effect on the date the notice was signed. Proceeds paid before we record a change of beneficiary will not be subject to the change. A beneficiary named irrevocably may not be changed without the written consent of that beneficiary.

Yancey did not follow this procedure. The beneficiary designation form received by Chubb Sovereign was ineffective because Yancey failed to designate a new primary beneficiary.[2] Further, the Home Office did not record any change. Thus, under unambiguous Policy language, when Yancey died, Jacobus was still the irrevocable beneficiary.

The Yancey Defendants appear to argue that Yancey intended to change the beneficiary and was prevented from doing so because Jacobus intercepted the Chubb Sovereign letters. Despite the

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[2] The naming of his parents as contingent beneficiaries did not affect his designation of Jacobus as the primary beneficiary.

assertions of the Yancey Defendants, the intent of the Insured is far from clear. On the beneficiary designation form, Yancey named his parents as contingent, and not primary, beneficiaries. That form was dated October 22, 1992. Yet, on December 27, 1993, in response to an inquiry from Jacobus' counsel as to whether Jacobus was still the beneficiary of the Policy, Yancey assured his attorney that he had not changed the beneficiary. Brief in Opposition to Motion for Partial Summary Judgment at 8. Then, on February 4, 1993, Yancey contradicted his earlier statement and noted that he was uncertain as to whether the change had been completed. Id. at 6-7. Although there is a question of fact as to Yancey's intent, the question is not material to the Court's decision (and thus does not preclude summary judgment) because Yancey did not comply in the first instance with the terms of the Policy.

Moreover, even if Yancey had intended to change the beneficiary designation, under the terms of the Policy, Jacobus was still required to give written consent before any change of beneficiary could occur. It is undisputed that Jacobus never gave written consent to Chubb Sovereign.[3] Additionally, the Yancey Defendants have failed to provide the Court with any authority

[3] The Yancey Defendants argue that, by virtue of Jacobus' execution of the divorce decree, she consented in writing to change her status under the Policy. The decree awarded Yancey "all personal property in [his] possession". A life insurance policy is considered an item of "personal property" and it is undisputed that the Policy was in Yancey's possession when he died. However, because the other prerequisites for changing the beneficiary were not met, the Court does not reach this issue at this time.

allowing it to override the clear Policy designation of an irrevocable beneficiary on the basis of the subsequent conduct of the beneficiary.

The Court concludes that Yancey did not effect a change of beneficiary under the Policy and, thus, on the date of Yancey's death, Jacobus was the irrevocable beneficiary of the proceeds.

The second question facing the Court is whether section 178 of title 15 of the Oklahoma Statutes changed that beneficiary designation as a matter of law after Yancey's death. Section 178 provides in relevant part:

> (A) If, after entering into a written contract in which provision is made for the payment of any death benefit (including life insurance contracts . . .), the party to the contract with the power to designate the beneficiary of any death benefit dies after being divorced from the beneficiary named to receive such death benefit in the contract, all provisions in such contract in favor of the decedent's former spouse are thereby revoked. . . .
>
> (B) Subsection A of this section shall not apply:
>
> . . . .
>
> 5. To the extent, if any, the contract contains a provision expressing an intention contrary to subsection A of this section. (emphasis added)

Jacobus' argument rests on two grounds: first, she contends that the statute is inapplicable because Yancey did not have "the power to designate the beneficiary" of the Policy after naming an irrevocable beneficiary; second, she argues that the statute is inapplicable because the designation of an irrevocable beneficiary under the Policy expresses an intention contrary to subsection A of the statute. Because the Court holds that Yancey's designation of Jacobus as irrevocable beneficiary under the Policy stripped Yancey

of the power to change the beneficiary without Jacobus' consent, the Court does not reach Jacobus' second argument.

The plain language of the Policy states that "[a] beneficiary named irrevocably may not be changed without the written consent of that beneficiary." Thus, the provision gives to Jacobus, as irrevocable beneficiary, the power to reject a change of beneficiary attempted by Yancey. While Yancey may initiate a change of beneficiary, the change will not be effective without the consent of Jacobus.

As a matter of law, when a beneficiary is designated as irrevocable, the beneficiary possesses a vested property right which the insured may not change. Ryan v. Andrewski, 242 P.2d 448, 451-52 (Okl. 1952). The Ryan court stated:

> [i]t is held by the great weight of authority that the interest of a designated beneficiary in an ordinary life policy vests upon the execution and delivery thereof, and, unless the same contains a provision authorizing a change of beneficiary without the consent thereof, the insured cannot make such change.

Id.; accord Graham v. Farmers New World Life Ins. Co., 841 P.2d 1165, 1167 (Okl. Ct. App. 1992) (if beneficiary shows that she was named as irrevocable beneficiary, then owner does not retain the right to change the beneficiary without her consent).[4] Thus, the language of the Policy and Oklahoma law support the Court's conclusion that, by designating Jacobus as irrevocable beneficiary, Yancey relinquished the right to change the beneficiary. Under the

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[4] The Yancey Defendants agree that Jacobus possessed a vested interest in the proceeds of the Policy. Brief in Opposition to Motion for Partial Summary Judgment at 12 n.4.

Policy, Yancey did not have "the power to designate the beneficiary". Therefore, by its own terms, the statute is inapplicable.[5]

In conclusion, the Court determines that Jacobus was the irrevocable beneficiary of the Policy when Yancey died and that section 178 of title 15 does not apply to change that designation as a matter of law.[6] The Court, therefore, grants the motion for partial summary judgment of Jacobus.

IT IS SO ORDERED.

This 1st day of May, 1995.

Sven Erik Holmes
United States District Judge

[5] Without any citation to supporting authority, the Yancey Defendants assert that "[a]s owner, only Mr. Yancey had ultimate control of the Policy and only he 'was entitled to the rights granted by th[e] policy.'" However, this assertion is inconsistent with the clear Policy language and the controlling legal principle expressed in Ryan and Graham.

[6] In opposition to Jacobus' motion, the Yancey Defendants argue that the divorce decree, to which Jacobus agreed, effected a change of beneficiary under the Policy and divested her of her irrevocable status. Because the Yancey Defendants have not moved for summary judgment, the subject matter of their crossclaims is not before the Court at this time. The Court expresses no opinion as to the merits of this argument.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

TOBIN DON LEMMONS,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 93-C-363-B
	)	
BRUCE DUNCAN, et al.,	)	
	)	
Defendants.	)	

ORDER

Plaintiff's claim against the Tulsa Police Department, for arresting him without a warrant, is the only claim remaining in this civil rights action.[1] The City of Tulsa has moved to dismiss arguing that the Plaintiff seeks to hold the City of Tulsa liable for the alleged acts of unknown Tulsa police officers, without asserting any specific custom, policy or procedure which caused his constitutional deprivations. Plaintiff objects on the ground that his criminal trial transcripts "in the District Court of Creek County implicate the Tulsa Police of having conducted the warrantless illegal search, seizure, and arrest of the Plaintiff." (Plaintiff's response, doc. #70, at 1.)

A court should dismiss a constitutional civil rights claim only if it appears beyond doubt that plaintiff could prove no set of facts in support of his claim which would entitle him to relief. Meade v. Grubbs, 841 F.2d 1512 (10th Cir. 1988) (citing Owens v. Rush, 654 F.2d 1370, 1378-79 (10th Cir. 1981)). For purposes of

[1]The Court has previously granted summary judgment in favor of Defendants Brant Green, Dan Jones, and Bruce Duncan, and has dismissed any claims against David Bates.

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reviewing a complaint for failure to state a claim, all allegations in the complaint must be presumed true and construed in a light most favorable to plaintiff. Id.; Hall v. Bellmon, 935 F.2d 1106, 1109 (10th Cir. 1991). Furthermore, pro se complaints are held to less stringent standards than pleadings drafted by lawyers and the court must construe them liberally. Haines v. Kerner, 404 U.S. 519, 520 (1972). Nevertheless, the court should not assume the role of advocate, and should dismiss claims which are supported only by vague and conclusory allegations. Hall, 935 F.2d at 1110.

Because the Tulsa Police Department is not a proper legal entity which can be sued in this civil rights action under 42 U.S.C. § 1983, the Court liberally construes Plaintiff's complaint to allege a claim against the City of Tulsa, a party amenable to suit. Martinez v. Winner, 771 F.2d 424, 444 (10th Cir. 1985); Johnson v. City of Erie, 834 F.Supp. 873, 878 (W.D.Pa. 1993); PBA Local No. 30 v. Woodbridge Police Dept., 832 F.Supp. 808, 826 (D.N.J. 1993); Moran v. Illinois State Police, No. 93-C-1554, 1993 WL 210107, at *1-2, U.S. Dist. LEXIS 7950, at *7-8 (N.D. Ill. June 11, 1993); Creppel v. Miller, No. 92-2531, 1993 WL 21408, at 1, U.S. Dist. LEXIS 792, at 1 (E.D. La January 22, 1993); Vanderlinde v. Brockman, No. 92-C-836-, 1992 WL 26737, at *1, U.S. Dist. LEXIS 1315, at *2 (N.D. Ill. February 5, 1992); Stump v. Gates, 777 F.Supp. 808, 815 (D. Colo. 1991), aff'd, 986 F.2d 1429 (10th Cir. 1989); Reese v. Chicago Police Dep't, 602 F.Supp. 441, 443 (N.D. Ill. 1984); Shelby v. City of Atlanta, 578 F.Supp. 1368, 1370 (N.D. Ga. 1984).

In order to state a claim against a municipality, like the City of Tulsa, under section 1983, Plaintiff must show that the municipality itself, through custom or policy, caused the alleged constitutional violation. Monell v. Dept. of Social Servs., 436 U.S. 658 (1978). There are two requirements for liability based on custom: (1) the custom must be attributable to the city through actual or constructive knowledge on the part of the policy-making officials; and (2) the custom must have been the cause of and the moving force behind the constitutional deprivation. Respondeat superior does not give rise to a section 1983 claim. Monell, 436 U.S. at 692-94; see also City of Canton v. Harris, 489 U.S. 378, 385 (1989).

After liberally construing the allegations in the complaint in the light most favorable to Plaintiff, Haines v. Kerner, 404 U.S. 519, 520 (1972), the Court concludes that Plaintiff has failed to allege a custom or policy with regard to the warrantless search, seizure, and arrest of Plaintiff. Nor has Plaintiff alleged that the City of Tulsa was grossly negligent in failing to train and supervise police officers. Taking the facts pled in the complaint, as well as Plaintiff's allegations in his response as true, Plaintiff has not alleged an unconstitutional policy attributable to a municipal policymaker, sufficient to progress past the pleading stage. See Oklahoma City v. Tuttle, 471 U.S. 808, 823-24 (1985) (plurality opinion) (single incident of unconstitutional activity not sufficient for municipal liability unless incident includes proof that it was caused by existing unconstitutional

policy attributable to municipal policymaker).

Accordingly, the motion to dismiss of the City of Tulsa (doc. #65) should be and is hereby **granted** and the Tulsa Police Department, sued as "unknown Tulsa Police officers," is **dismissed** as a party in this case.

SO ORDERED THIS 2nd day of March, 1995.

THOMAS R. BRETT, Chief Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

TOI L. BANKS,

Plaintiff,

v.

MOTEL 6 INC.,

Defendant.

Case No. 93-C-1155-K

ORDER

The court has for consideration the Report and Recommendation of the Magistrate Judge filed March 7, 1995, in which the Magistrate Judge recommended that the case be dismissed without prejudice for failure to prosecute. No exceptions or objections have been filed and the time for filing such exceptions or objections has expired.

After careful consideration of the record and the issues, the court has concluded that the Report and Recommendation of the Magistrate Judge should be and hereby is affirmed.

IT IS THEREFORE ORDERED that this case is dismissed without prejudice for failure to prosecute.

Dated this 3 day of May, 1995.

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

18

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

IT-TULSA HOLDINGS, INC.,

Plaintiff,

vs.

BIG FOUR FOUNDRIES CORP., an Oklahoma corporation, and TULSA-SAPULPA UNION RAILWAY CO., an Oklahoma corporation,

Defendants.

No. 94-C-498-K

ORDER

Before the Court is the joint motion to stay proceedings until September 29, 1995, which will not be granted. Upon application, the Court will consider an extension of the presently existing Scheduling Order not to exceed sixty days.

It is the Order of the Court that the joint motion to stay proceedings is hereby DENIED.

ORDERED this 3 day of May, 1995.

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

27

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

RONALD EARL WESTMORELAND
#40727-019,

Petitioner,

v.

THE UNITED STATES PAROLE COMMISSION,

Respondent.

CASE NO. 95 C 248H

Under 2241

ORDER

THIS MATTER comes before this Court upon Petitioner's Motion to Dismiss herein, the Court finds that the above-styled and captioned matter should be dismissed, with prejudice.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Petitioner's Motion to Dismiss be granted.

DATED this 2nd day of ~~April~~ May, 1995.

S/ SVEN ERIK HOLMES

~~JOHN LEO WAGNER, MAGISTRATE~~
U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

GILBERT R. SUITER,

Plaintiff,

vs.

MITCHELL MOTOR COACH SALES, INC., ROBERT E. DESBIEN and NORMA J. DESBIEN,

Defendants,

vs.

BLUE BIRD BODY COMPANY, INC.,

Third-Party Defendant.

Case No. 93-C-815-H

JUDGMENT

By reason of the Court's Order of April 25, 1995, the Court hereby enters judgment in favor of third-party defendant, Blue Bird Body Company, Inc., and against the plaintiff, Gilbert Suiter, and against defendant, Mitchell Motor Coach Sales, Inc., pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.

The Court hereby makes the express determination, pursuant to Rule 54(b), that there is no just reason for delay, and expressly directs that judgment be entered in favor of Blue Bird Body Company, Inc. as set out above.

Dated this 2nd day of May, 1995.

S/ SVEN ERIK HOLMES
SVEN ERIK HOLMES
UNITED STATES DISTRICT JUDGE

Timothy A. Carney, Esq.
GABLE & GOTWALS
15 W. 6th Street, Suite 2000
Tulsa, Oklahoma 74119
(918) 582-9201

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

BILLY E. KUMPE,

Plaintiff,

vs.

CEDAR COMPUTER CENTER, INC., an Iowa Corporation, and JAMAL KHATIB, President, Cedar Computer Center, Inc., and ROB PEMBERTON, Branch Manager, Cedar Computer Center, Inc.

Defendants.

Case No. 94-C-1043-H

ENTERED ON DOCKET

DATE MAY 0 3 1995

FILED

MAY 0 2 1995

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

O R D E R

The above captioned case is dismissed without prejudice, upon the request of Plaintiff Billy E. Kumpe, and without objection by the Defendants.

IT IS SO ORDERED.

THIS 2ND DAY OF ~~April~~ MAY, 1995.

Sven Erik Holmes
United States District Judge

(6)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DANNY THOMAS,

Plaintiff,

v.

KOCH INDUSTRIES, INC., a foreign corporation,

Defendant.

Case No. 95-C-343H

ORDER OF REMAND

Based upon the written application filed herein by the Defendant, Koch Industries, Inc. ("Koch"), the Court finds that the captioned action should be remanded to the District Court in and for Osage County, State of Oklahoma, Case No. CJ-95-83.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that this case be and the same is hereby remanded to the District Court in and for Osage County, State of Oklahoma, as Case No. CJ-95-83.

S/ SVEN ERIK HOLMES

United States District Judge

APPROVED BY:

Fred V. Monachello
Monachello & Watkins
616 South Main, Suite 1000
Tulsa, Oklahoma 74103
(918) 582-0909
Attorney for Plaintiff

Larry D. Leonard, OBA #5380
ZARBANO, LEONARD, SCOTT & FEHRLE
1516 S. Boston Ave., Suite 316
Tulsa, Oklahoma 74119-4019
(918) 583-8700
Attorneys for Defendant

ENTERED ON DOCKET
DATE MAY 0 3 1995

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ROGER EARL BAZE;
EVELYN MARCINE BAZE;
LINDA SUE (EPPERSON) SIMMS;
MARK J. SIMMS;
COUNTY TREASURER, Creek County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Creek County, Oklahoma,

Defendants.

FILED
MAY [illegible] 1995
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

Civil Case No. 94-C-908-K

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 1 day of May, 1995. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Neal B. Kirkpatrick, Assistant United States Attorney; the Defendants, COUNTY TREASURER, Creek County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Creek County, Oklahoma, appear not having previously filed a Disclaimer; and the Defendants, ROGER EARL BAZE, EVELYN MARCINE BAZE, LINDA SUE (EPPERSON) SIMMS, and MARK J. SIMMS, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, LINDA SUE (EPPERSON) SIMMS, signed a Waiver of Summons on September 30, 1994; that the Defendant, MARK J. SIMMS, signed a Waiver of Summons on September 30, 1994; that Defendant, COUNTY TREASURER, Creek County, Oklahoma, acknowledged receipt of Summons and Complaint on September 27, 1994 by

NOTE: THIS ORD[illegible]
BY MO[illegible]
PRO SE LITIGANTS IMMEDIATELY
UPON RECEIPT

Certified Mail; and that Defendant, BOARD OF COUNTY COMMISSIONERS, Creek County, Oklahoma, acknowledged receipt of Summons and Complaint on September 27, 1994, by Certified Mail.

The Court further finds that the Defendants, ROGER EARL BAZE and EVELYN MARCINE BAZE, were served by publishing notice of this action in the Sapulpa Legal News, a newspaper of general circulation in Creek County, Oklahoma, once a week for six (6) consecutive weeks beginning January 26, 1995, and continuing through March 2, 1995, as more fully appears from the verified proof of publication duly filed herein; and that this action is one in which service by publication is authorized by 12 O.S. Section 2004(c)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendants, ROGER EARL BAZE and EVELYN MARCINE BAZE, and service cannot be made upon said Defendants within the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendants without the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known addresses of the Defendants, ROGER EARL BAZE and EVELYN MARCINE BAZE. The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America, acting through the Secretary of Housing and Urban Development, and its attorneys, Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the parties served by publication with respect to their present or last known places of residence and/or mailing

addresses. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendants served by publication.

It appears that the Defendants, COUNTY TREASURER, Creek County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Creek County, Oklahoma, filed their Disclaimer on October 5, 1994; and that the Defendants, ROGER EARL BAZE, EVELYN MARCINE BAZE, LINDA SUE (EPPERSON) SIMMS, and MARK J. SIMMS, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Creek County, Oklahoma, within the Northern Judicial District of Oklahoma:

The West Four Hundred Ninety-five feet (495') of the South Half of the South Half of the Southeast Quarter (/2, s/2, SE/4) of Section Three (3), Township Eighteen (18) North, Range Ten (10) East of the Indian Base and Meridian, in Creek County, State of Oklahoma, according the United States Government Survey thereof.

The Court further finds that on June 11, 1986, Richard L. Sanders and Patricia A. Sanders, executed and delivered to CITYFED MORTGAGE COMPANY, their mortgage note in the amount of $69,961.00, payable in monthly installments, with interest thereon at the rate of Ten and One-Half percent (10.5%) per annum.

The Court further finds that as security for the payment of the above-described note, Richard L. Sanders and Patricia A. Sanders, executed and delivered to CITYFED MORTGAGE COMPANY a mortgage dated June 11, 1986, covering the above-described

property. Said mortgage was recorded on June 19, 1986, in Book 206, Page 711-714, in the records of Creek County, Oklahoma.

The Court further finds that on June 11, 1986, CITYFED MORTGAGE COMPANY, assigned the above-described mortgage note and mortgage to CITY FEDERAL SAVINGS BANK. This Assignment of Mortgage was recorded on June 25, 1986, in Book 206, Page 1314, in the records of Creek County, Oklahoma. This assignment was re-recorded on January 21, 1987, in Book 215, Page 1530, in the records of Creek County, Oklahoma, to show the Book and Page of the Mortgage; and re-recorded again on April 24, 1987, in Book 219, Page 1993, in the records of Creek County, Oklahoma, to correct the legal.

The Court further finds that on May 3, 1990, City Federal Savings Bank, assigned the above-described mortgage note and mortgage to City Savings Bank, F.S.B. This Assignment of Mortgage was recorded on May 22, 1990, in Book 263, Page 1361, in the records of Creek County, Oklahoma.

The Court further finds that on May 14, 1990, City Savings Bank, F.S.B., assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns. This Assignment of Mortgage was recorded on May 22, 1990, in Book 263, Page 1362, in the records of Creek County, Oklahoma. A Corrected Assignment of Mortgage was recorded on October 29, 1990, in Book 269, Page 1551, in the records of Creek County, Oklahoma, to replace the assignment which was recorded on May 22, 1990, in Book 263, Page 1362.

The Court further finds that on May 25, 1989, Richard L. Sanders and Patricia A. Sanders, husband and wife, granted a general warranty deed to Roger Earl Baze and Evelyn Marcine Baze, husband and wife. This deed was recorded with the Creek

County Clerk on June 6, 1989, in Book 249, Page 1405, and the Defendants, ROGER EARL BAZE and EVELYN MARCINE BAZE, husband and wife, assumed thereafter payment of the amount due pursuant to the note and mortgage described above.

The Court further finds that on April 24, 1990, the Defendants, ROGER E. BAZE and EVELYN M. BAZE, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. Superseding agreements were reached between these same parties on November 21, 1990, May 31, 1991, March 12, 1992, May 28, 1992, and February 26, 1993.

The Court further finds that the Defendants, ROGER EARL BAZE and EVELYN MARCINE BAZE, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, ROGER EARL BAZE and EVELYN MARCINE BAZE, are indebted to the Plaintiff in the principal sum of $102,250.46, plus interest at the rate of 10.5 percent per annum from July 27, 1994 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendants, ROGER EARL BAZE, EVELYN MARCINE BAZE, LINDA SUE (EPPERSON) SIMMS and MARK J. SIMMS, are in default, and have no right, title or interest in the subject real property.

The Court further finds that the Defendants, COUNTY TREASURER and BOARD OF COUNTY COMMISSIONERS, Creek County, Oklahoma, claim no right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment In Rem against the Defendants, ROGER EARL BAZE and EVELYN MARCINE BAZE, in the principal sum of $102,250.46, plus interest at the rate of 10.5 percent per annum from July 27, 1994 until judgment, plus interest thereafter at the current legal rate of 6.28 percent per annum until paid, plus the costs of this action, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, COUNTY TREASURER and BOARD OF COUNTY COMMISSIONERS, Creek County, Oklahoma, ROGER EARL BAZE, EVELYN MARCINE BAZE, LINDA SUE (EPPERSON) SIMMS and MARK J. SIMMS, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, ROGER EARL BAZE and EVELYN MARCINE BAZE, to satisfy the judgment In Rem of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

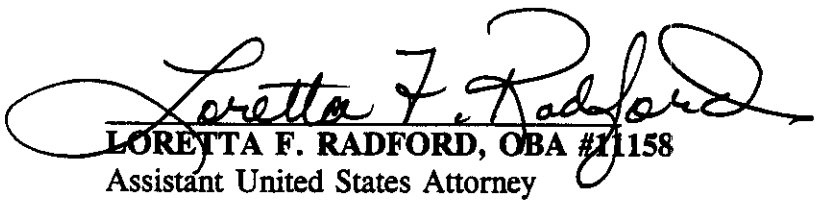
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

s/ TERRY C. KERN

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney



LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
3460 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

Judgment of Foreclosure
Civil Action No. 94-C 908K

LFR:flv

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

BILLIE JUNE WECKER aka Billie J. Wecker;
UNKNOWN SPOUSE OF Billie June Wecker aka Billie J. Wecker;
CITY OF GLENPOOL, Oklahoma;
COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma,

Defendants.

Civil Case No. 95-C-0023-K

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 1 day of May, 1995. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, appear by Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma; and the Defendants, BILLIE JUNE WECKER aka Billie J. Wecker, UNKNOWN SPOUSE OF Billie June Wecker aka Billie J. Wecker, if any, and CITY OF GLENPOOL, Oklahoma, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, CITY OF GLENPOOL, Oklahoma, was served a copy of Summons and Complaint on January 10, 1995, by Certified Mail.

NOTE: THIS ORDER IS TO BE MAILED BY MOVANT TO ALL COUNSEL AND PRO SE LITIGANTS IMMEDIATELY UPON RECEIPT.

The Court further finds that the Defendants, BILLIE JUNE WECKER aka Billie J. Wecker and UNKNOWN SPOUSE OF BILLIE JUNE WECKER aka Billie J. Wecker, if any, were served by publishing notice of this action in the Tulsa Daily Commerce & Legal News, a newspaper of general circulation in Tulsa County, Oklahoma, once a week for six (6) consecutive weeks beginning February 17, 1995, and continuing through March 24, 1995, as more fully appears from the verified proof of publication duly filed herein; and that this action is one in which service by publication is authorized by 12 O.S. Section 2004(c)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendants, BILLIE JUNE WECKER aka Billie J. Wecker and UNKNOWN SPOUSE OF Billie June Wecker aka Billie J. Wecker, if any, and service cannot be made upon said Defendants within the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendants without the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known addresses of the Defendants, BILLIE JUNE WECKER aka Billie J. Wecker and UNKNOWN BILLIE JUNE WECKER aka Billie J. Wecker, if any. The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America, acting through the Department of Housing and Urban Development, and its attorneys, Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the parties served by publication with respect to their present or last known places of residence and/or mailing addresses. The Court accordingly approves

and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendants served by publication.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answers on January 19, 1995; that the Defendants, BILLIE JUNE WECKER aka Billie J. Wecker, UNKNOWN SPOUSE OF Billie June Wecker aka Billie J. Wecker, if any, and CITY OF GLENPOOL, Oklahoma, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that the Defendant, BILLIE JUNE WECKER aka Billie J. Wecker, is one and the same and sometimes referred to as Billie J. Wecker, and will hereinafter be referred to as "BILLIE JUNE WECKER."

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

LOT FOURTEEN (14), BLOCK SEVEN (7), ROLLING MEADOWS II, AN ADDITION TO THE CITY OF GLENPOOL, TULSA COUNTY, STATE OF OKLAHOMA, ACCORDING TO THE RECORDED PLAT THEREOF.

The Court further finds that the Defendant, BILLIE JUNE WECKER, became the record owner of the real property involved in this action by virtue of a certain Decree of Divorce granted in Case No. FD-88-03947 filed in the Tulsa County District Court, on August 1, 1988, which Decree was filed on August 27, 1992, in Book 5430, Page 1996, in the records of Tulsa County, Oklahoma.

The Court further finds that on August 28, 1986, Charles W. Wecker and the Defendant, BILLIE J. WECKER, executed and delivered to COMMONWEALTH MORTGAGE CORPORATION OF AMERICA, their mortgage note in the amount of $44,322.00, payable in monthly installments, with interest thereon at the rate of ten percent (10%) per annum.

The Court further finds that as security for the payment of the above-described note, Charles W. Wecker and the Defendant, BILLIE J. WECKER, husband and wife, executed and delivered to COMMONWEALTH MORTGAGE CORPORATION OF AMERICA a mortgage dated August 28, 1986, covering the above-described property. Said mortgage was recorded on September 10, 1986, in Book 4968, Page 2569, in the records of Tulsa County, Oklahoma.

The Court further finds that on April 24, 1987, COMMONWEALTH MORTGAGE CORPORATION OF AMERICA assigned the above-described mortgage note and mortgage to COMMONWEALTH MORTGAGE COMPANY OF AMERICA L.P. This Assignment of Mortgage was recorded on June 11, 1987, in Book 5029, Page 2020, in the records of Tulsa County, Oklahoma.

The Court further finds that on February 29, 1988, COMMONWEALTH MORTGAGE COMPANY OF AMERICA, L.P., assigned the above-described mortgage note and mortgage to THE LOMAS & NETTLETON COMPANY. This Assignment of Mortgage was recorded on June 6, 1988, in Book 5104, Page 1647, in the records of Tulsa County, Oklahoma.

The Court further finds that on January 23, 1989, LOMAS MORTGAGE USA, INC., formerly The Lomas & Nettleton Co., assigned the above-described mortgage note and mortgage to the SECRETARY OF HOUSING AND URBAN DEVELOPMENT OF

WASHINGTON, D.C., his successors and assigns. This Assignment of Mortgage was recorded on January 27, 1989, in Book 5163, Page 2254, in the records of Tulsa County, Oklahoma.

The Court further finds that on January 6, 1989, the Defendant, BILLIE JUNE WECKER and Charles W. Wecker, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. Superseding agreements were reached between the Defendant, BILLIE JUNE WECKER, and the Plaintiff on September 5, 1989, January 24, 1990, July 3, 1990, October 18, 1990 and November 19, 1991.

The Court further finds that the Defendant, BILLIE JUNE WECKER, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of her failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendant, BILLIE JUNE WECKER, is indebted to the Plaintiff in the principal sum of $59,614.79, plus interest at the rate of 10 percent per annum from November 1, 1994 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of ad valorem taxes in the amount of $549.00, plus penalties and interest, for the year of 1994. Said lien is superior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of $12.00 which became a lien on the

property as of June 26, 1992. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendants, BILLIE JUNE WECKER aka Billie J. Wecker, UNKNOWN SPOUSE OF Billie June Wecker aka Billie J. Wecker, if any, and CITY OF GLENPOOL, Oklahoma, are in default, and have no right, title or interest in the subject real property.

The Court further finds that the Defendant, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, claims no right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment In Rem against the Defendant, BILLIE JUNE WECKER, in the principal sum of $59,614.79, plus interest at the rate of 10 percent per annum from November 1, 1994 until judgment, plus interest thereafter at the current legal rate of 6.78 percent per annum until paid, plus the costs of this action, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, have and recover judgment

in the amount of $549.00, plus penalties and interest, for ad valorem taxes for the year 1994, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, have and recover judgment in the amount of $12.00, plus costs and interest, for personal property taxes for the year 1991, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, BILLIE JUNE WECKER aka Billie J. Wecker, UNKNOWN SPOUSE OF Billie June Wecker aka Billie J. Wecker, if any, and CITY OF GLENPOOL, Oklahoma, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendant, BILLIE JUNE WECKER, to satisfy the judgment In Rem of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of $549.00, plus penalties

and interest, for ad valorem taxes which are presently due and owing on said real property;

Third:

In payment of the judgment rendered herein in favor of the Plaintiff;

Fourth:

In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of $12.00, plus penalties and interest, personal property taxes which are currently due and owing.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof. **s/ TERRY C. KERN**

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney

LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
3460 U.S. Courthouse
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DICK A. BLAKELEY, OBA #852
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Tulsa, Oklahoma 74103
(918) 596-4842
Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Tulsa County, Oklahoma

Judgment of Foreclosure
Civil Action No. 95-C-0023K

LFR:flv

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff, vs. BILLIE JUNE WECKER aka Billie J. Wecker; UNKNOWN SPOUSE OF Billie June Wecker aka Billie J. Wecker; CITY OF GLENPOOL, Oklahoma; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, Defendants.	)	FILED MAY 1 1995 Richard M. Lawrence, Clerk U. S. DISTRICT COURT NORTHERN DISTRICT OF OKLAHOMA Civil Case No. 95-C-0023-K

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 1 day of May, 1995. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, appear by Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma; and the Defendants, BILLIE JUNE WECKER aka Billie J. Wecker, UNKNOWN SPOUSE OF Billie June Wecker aka Billie J. Wecker, if any, and CITY OF GLENPOOL, Oklahoma, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, CITY OF GLENPOOL, Oklahoma, was served a copy of Summons and Complaint on January 10, 1995, by Certified Mail.

The Court further finds that the Defendants, BILLIE JUNE WECKER aka Billie J. Wecker and UNKNOWN SPOUSE OF BILLIE JUNE WECKER aka Billie J. Wecker, if any, were served by publishing notice of this action in the Tulsa Daily Commerce & Legal News, a newspaper of general circulation in Tulsa County, Oklahoma, once a week for six (6) consecutive weeks beginning February 17, 1995, and continuing through March 24, 1995, as more fully appears from the verified proof of publication duly filed herein; and that this action is one in which service by publication is authorized by 12 O.S. Section 2004(c)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendants, BILLIE JUNE WECKER aka Billie J. Wecker and UNKNOWN SPOUSE OF Billie June Wecker aka Billie J. Wecker, if any, and service cannot be made upon said Defendants within the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendants without the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known addresses of the Defendants, BILLIE JUNE WECKER aka Billie J. Wecker and UNKNOWN BILLIE JUNE WECKER aka Billie J. Wecker, if any. The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America, acting through the Department of Housing and Urban Development, and its attorneys, Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the parties served by publication with respect to their present or last known places of residence and/or mailing addresses. The Court accordingly approves

and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendants served by publication.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answers on January 19, 1995; that the Defendants, BILLIE JUNE WECKER aka Billie J. Wecker, UNKNOWN SPOUSE OF Billie June Wecker aka Billie J. Wecker, if any, and CITY OF GLENPOOL, Oklahoma, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that the Defendant, BILLIE JUNE WECKER aka Billie J. Wecker, is one and the same and sometimes referred to as Billie J. Wecker, and will hereinafter be referred to as "BILLIE JUNE WECKER."

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

LOT FOURTEEN (14), BLOCK SEVEN (7), ROLLING MEADOWS II, AN ADDITION TO THE CITY OF GLENPOOL, TULSA COUNTY, STATE OF OKLAHOMA, ACCORDING TO THE RECORDED PLAT THEREOF.

The Court further finds that the Defendant, BILLIE JUNE WECKER, became the record owner of the real property involved in this action by virtue of a certain Decree of Divorce granted in Case No. FD-88-03947 filed in the Tulsa County District Court, on August 1, 1988, which Decree was filed on August 27, 1992, in Book 5430, Page 1996, in the records of Tulsa County, Oklahoma.

The Court further finds that on August 28, 1986, Charles W. Wecker and the Defendant, BILLIE J. WECKER, executed and delivered to COMMONWEALTH MORTGAGE CORPORATION OF AMERICA, their mortgage note in the amount of $44,322.00, payable in monthly installments, with interest thereon at the rate of ten percent (10%) per annum.

The Court further finds that as security for the payment of the above-described note, Charles W. Wecker and the Defendant, BILLIE J. WECKER, husband and wife, executed and delivered to COMMONWEALTH MORTGAGE CORPORATION OF AMERICA a mortgage dated August 28, 1986, covering the above-described property. Said mortgage was recorded on September 10, 1986, in Book 4968, Page 2569, in the records of Tulsa County, Oklahoma.

The Court further finds that on April 24, 1987, COMMONWEALTH MORTGAGE CORPORATION OF AMERICA assigned the above-described mortgage note and mortgage to COMMONWEALTH MORTGAGE COMPANY OF AMERICA L.P. This Assignment of Mortgage was recorded on June 11, 1987, in Book 5029, Page 2020, in the records of Tulsa County, Oklahoma.

The Court further finds that on February 29, 1988, COMMONWEALTH MORTGAGE COMPANY OF AMERICA, L.P., assigned the above-described mortgage note and mortgage to THE LOMAS & NETTLETON COMPANY. This Assignment of Mortgage was recorded on June 6, 1988, in Book 5104, Page 1647, in the records of Tulsa County, Oklahoma.

The Court further finds that on January 23, 1989, LOMAS MORTGAGE USA, INC., formerly The Lomas & Nettleton Co., assigned the above-described mortgage note and mortgage to the SECRETARY OF HOUSING AND URBAN DEVELOPMENT OF

WASHINGTON, D.C., his successors and assigns. This Assignment of Mortgage was recorded on January 27, 1989, in Book 5163, Page 2254, in the records of Tulsa County, Oklahoma.

The Court further finds that on January 6, 1989, the Defendant, BILLIE JUNE WECKER and Charles W. Wecker, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. Superseding agreements were reached between the Defendant, BILLIE JUNE WECKER, and the Plaintiff on September 5, 1989, January 24, 1990, July 3, 1990, October 18, 1990 and November 19, 1991.

The Court further finds that the Defendant, BILLIE JUNE WECKER, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of her failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendant, BILLIE JUNE WECKER, is indebted to the Plaintiff in the principal sum of $59,614.79, plus interest at the rate of 10 percent per annum from November 1, 1994 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of ad valorem taxes in the amount of $549.00, plus penalties and interest, for the year of 1994. Said lien is superior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of $12.00 which became a lien on the

property as of June 26, 1992. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendants, BILLIE JUNE WECKER aka Billie J. Wecker, UNKNOWN SPOUSE OF Billie June Wecker aka Billie J. Wecker, if any, and CITY OF GLENPOOL, Oklahoma, are in default, and have no right, title or interest in the subject real property.

The Court further finds that the Defendant, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, claims no right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment In Rem against the Defendant, BILLIE JUNE WECKER, in the principal sum of $59,614.79, plus interest at the rate of 10 percent per annum from November 1, 1994 until judgment, plus interest thereafter at the current legal rate of 6.78 percent per annum until paid, plus the costs of this action, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, have and recover judgment

in the amount of $549.00, plus penalties and interest, for ad valorem taxes for the year 1994, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, have and recover judgment in the amount of $12.00, plus costs and interest, for personal property taxes for the year 1991, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, BILLIE JUNE WECKER aka Billie J. Wecker, UNKNOWN SPOUSE OF Billie June Wecker aka Billie J. Wecker, if any, and CITY OF GLENPOOL, Oklahoma, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendant, BILLIE JUNE WECKER, to satisfy the judgment In Rem of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of $549.00, plus penalties

and interest, for ad valorem taxes which are presently due and owing on said real property;

Third:

In payment of the judgment rendered herein in favor of the Plaintiff;

Fourth:

In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of $12.00, plus penalties and interest, personal property taxes which are currently due and owing.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

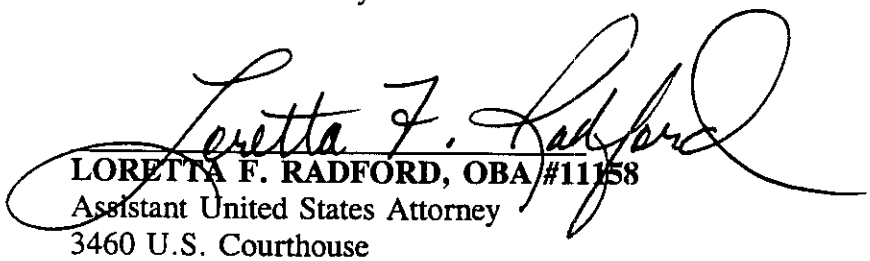
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

s/ TERRY C. KERN

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney



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Tulsa County, Oklahoma

Judgment of Foreclosure
Civil Action No. 95-C-0023K

LFR:flv

IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF OKLAHOMA

KENNEY MOORE,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

Case No. 94-CV-397-K

O R D E R

Rule 41(b) of the Federal Rules of Civil Procedure provides as follows:

> ***(b) For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.***

In the action herein, notice pursuant to Rule 41(b) was mailed to counsel of record or to the parties, at their last address of record with the Court, on March 22, 1995. No action has been taken in the case within thirty (30) days of the date of the notice.

Therefore, it is the Order of the Court that this action is in all respects dismissed.

Dated this 1 day of May, 1995.

United States District Judge

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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

Donna Protho, SSN: 448-36-9997,	)	
v.	)	Civ. 93-C-410-B
Shirley S. Chater[1], Commissioner of the Social Security Administration,	)	
Defendant.	)	

O R D E R

The Court, having considered Petitioner's Application and Motion for Final Order for Attorney Fees Under 28 U.S.C. §2412, the Equal Access to Justice Act (EAJA), and having reviewed the arguments and representations of counsel, finds:

1) Petitioner requests attorney fees pursuant to 28 U.S.C. Section 2412, based upon a successful challenge of Defendant's decision denying Plaintiff's Social Security Disability benefits (SSD). The parties have stipulated that $100.00 per hour for $2,710.00 and compensable expenses in the amount of $27.75 is a fair and reasonable amount under 28 U.S.C. §2412.

2) The Court finds that the Defendant's position was not substantially justified, nor reasonable as to the facts

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1.Pursuant to P.L. No. 103-296, the Social Security Independence and Program Improvements Act of 1994, the function of the Secretary of Health and Human Services in Social Security case was transferred to the Commissioner of Social Security effective March 31, 1995. In accordance with section 106(d) of P.L. 103-296 Shirley S. Chater, Commissioner of Social Security, should be substituted for Donna E. Shalala, Secretary of Health and Human Services, as the defendant in this action. No further action need be taken to continue this suit. Id.

of the case in originally denying the benefits, and that an award under the EAJA is justified, and the Court hereby sustains Petitioner's Motion for attorney fees.

3) That counsel, Mark E. Buchner, for Plaintiff has expended 27.10 hours in pursuit of the Plaintiff's claim in the United States District Court for the Northern District of Oklahoma and that $100.00 per hour is a fair and reasonable hourly fee, and that a fee of **$2,737.75** shall be awarded to Mark E. Buchner, Attorney at Law,

4) No attorney fee award has yet been made by the Defendant to Plaintiff's representative in the administrative proceedings before the Social Security Administration. Petitioner shall advise the Social Security Administration of this award and any request for fees related to the administrative proceedings, if any.

5) If an award of fees for work performed in this court is sought and awarded under 42 U.S.C. §406, Petitioner shall return to the Plaintiff the lesser of the Section 406 award or the amount awarded by this Order, pursuant to *Weakley v. Bowen*, 803 F.2d 575 (10th Cir. 1986).

IT IS THEREFORE SO ORDERED.

DATED this 1st day of May, 1995.

S/ THOMAS R. BRETT

United States Judge

APPROVED:

Mark E. Buchner, OBA #1279
Petitioner and Attorney for Plaintiff
3726 South Peoria
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Tulsa, Oklahoma 74105
(918) 744-5006

and

Phil Pinnell,
Assistant U.S. Attorney
Northern District of Oklahoma
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103
(918) 581-7463

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

MAY - 1 1995

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

REUBEN C. CORNELIUS,

Plaintiff,

v.

DONNA E. SHALALA,
Secretary of Health and
Human Services,

Defendant.

Case No. 94-C-0624-B

EOD: 5-2-95

O R D E R

Upon consideration of the Defendant's Motion to Remand filed herein, to which there is no objection, IT IS ORDERED, ADJUDGED AND DECREED that this case be, and it is hereby remanded to the Defendant for further administrative action pursuant to sentence four (4) of § 205(g) of the Social Security Act, 42 U.S.C. § 405(g). Melkonyan v. Sullivan, 501 U.S. 89 (1991).

THUS DONE AND SIGNED on this 1st day of May 1995.

JEFFREY S. WOLFE
UNITED STATES MAGISTRATE JUDGE

SUBMITTED BY:

STEPHEN C. LEWIS
United States Attorney

For **PETER BERNHARDT, OBA #741**
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(918) 581-7463

19

922956275

Attorney ID#11352

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

MAY - 1 1995

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

FEDERAL DEPOSIT INSURANCE CORPORATION, as Liquidating Agent for TOWN & COUNTRY BANK;

Plaintiff,

vs.

LARRY G. WEBB and LYNN M. WEBB, husband and wife; THE LIBERTY NATIONAL BANK AND TRUST COMPANY OF OKLAHOMA CITY; UNITED STATES OF AMERICA by and through the Department of Treasury ex rel INTERNAL REVENUE SERVICE; TULSA COUNTY TREASURER and BOARD OF TULSA COUNTY COMMISSIONERS;

Defendants.

Case No. 93-C-447B

EOD 5/2/95

DEFICIENCY JUDGMENT

Now, on the 1ST day of May, 1995, there came on for hearing the Motion of Plaintiff for Leave to Enter Deficiency Judgment herein filed on October 31, 1994; Plaintiff, FEDERAL DEPOSIT INSURANCE CORPORATION, appearing by and through its attorney, Mark W. Dixon, and Defendants, LARRY G. WEBB and LYNN M. WEBB, husband and wife, appearing by and through their attorney, Scott P. Kirtley.

The Court upon consideration of said Motion and of the evidence produced in open Court, finds that the fair and reasonable market value of the mortgaged premises as of the date of the Sheriff's Sale herein was $96,835.00. The Court further finds that the aggregate amount of the judgment is $329,082.42; and that said Plaintiff is accordingly entitled to a deficiency judgment against the said Defendants for the said amount, less the market value of the property, as above determined, to-wit:

> The North 60 feet of tract of land located in the NE¼ of the NE¼ of Section 10, Township 19 North, Range 13 East of the Indian Base and Meridian, Tulsa County, State of Oklahoma, according to the U.S. Government survey thereof, more particularly described as follows, to-wit: COMMENCING at a point in the Northerly boundary of said NE¼ of NE¼ a distance of 380 feet from the NE corner thereof; thence South and parallel with the East boundary of said NE¼ of NE¼ a distance of 250 feet to a Point of Beginning; thence South and parallel with the East boundary of said NE¼ of NE¼ a distance of 127.39 feet; thence North and parallel with the

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East boundary of said NE¼ of NE¼ a distance of 380 feet; thence North 89°27'40" East and parallel with the Northerly boundary of said NE¼ of NE¼ a distance of 127.39 feet to the Point of Beginning.

AND:

Lot Three (3), Block One (1), BIXBY INDUSTRIAL PARK, an addition to the Town of Bixby, County of Tulsa, State of Oklahoma, according to the recorded plat thereof.

for the sum of $300,000.00.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED BY THE COURT the Plaintiff, FEDERAL DEPOSIT INSURANCE CORPORATION, have and recover from the Defendants, LARRY G. WEBB and LYNN M. WEBB, husband and wife, a deficiency judgment in the amount of $300,000.00, with costs and interest at 6.99% per annum from the date of judgment, until paid.

JUDGE OF THE DISTRICT COURT

APPROVED:

WORKS & LENTZ, INC.

By: _____
Mark W. Dixon, OBA #2378
K. Jack Holloway, OBA #11352
1437 South Boulder, Suite 900
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(918) 582–3191
Attorney for Plaintiff
FEDERAL DEPOSIT INSURANCE CORPORATION

RIGGS, ABNEY, NEAL TURBPEN,
ORBISON & LEWIS

By: _____
Scott P. Kitley, OBA #11388
502 West 6th Street
Tulsa, Oklahoma 74119
(918) 587–3151
Attorneys for Defendants
LARRY G. WEBB and LYNN M. WEBB

2675.004.5

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MARCEL LAMAR JACKSON,

Petitioner,

vs.

RON CHAMPION,

Respondent.

No. 94-C-377-B

EDD 5/1/95

ORDER

This is a proceeding on a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner, currently confined in the Oklahoma Department of Corrections, challenges the judgment and sentence of the Tulsa County District Court for Robbery with Firearms entered in Case Nos. CRF-87-2455, CRF-87-2558, and CRF-87-2623. Respondent has filed a Rule 5 response to which Petitioner has replied. Petitioner has also filed a motion for an evidentiary hearing. As more fully set out below, the Court concludes that Petitioner's motion for an evidentiary hearing and petition for a writ of habeas corpus should be denied.

I. BACKGROUND

On August 26, 1987, Petitioner pled guilty to Robbery with Firearms in Case Nos. CRF-87-2455, CRF-87-2558, and CRF-87-2623, and received a twenty-year sentence, to be served concurrently in each case, on October 9, 1987. Petitioner did not appeal, although the state judge advised him of his right to file a motion to withdraw his guilty pleas and then file an appeal. On January 22,

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1988, Petitioner requested a review of his sentence according to the provisions of 22 Okla. Stat. § 982a. After a hearing, at which only Petitioner's retained counsel was present, the state court declined to modify Petitioner's sentence.

On July 24, 1990, Petitioner filed his first application for post-conviction relief, alleging that his due process rights were denied because he was not permitted to be present at the sentence-review hearing which his counsel had requested pursuant to section 982a. The District Court denied the application on January 3, 1991, and Petitioner did not appeal. (Exs. A and B attached to Respondent's response, doc. #6.)

On November 18, 1993, Petitioner filed a second post-conviction application, alleging (1) that he was denied an appeal through no fault of his own because the state judge failed to advise him that he had a right to appointed counsel on appeal and the right to a "case made at public expense," and (2) that his sentences were unconstitutionally enhanced under 21 Okla. Stat. § 801 because he did not have three prior convictions for armed robbery. In his amended application for post-conviction relief, Petitioner also alleged that the court did not properly explain the sentence enhancement provisions to him, and therefore, his sentences were improperly enhanced. (Ex. C attached to Respondent's response, doc. #6.) On December 14, 1993, the District Court denied relief and Petitioner appealed only to the extent that he was denied an appeal out of time. (Ex. D attached to Respondent's response, doc. #6.) On March 2, 1994, the Oklahoma

Court of Criminal Appeals affirmed, stating the following:

> Appellant's failure to perfect a timely direct appeal gives him the appearance of one who has waived or deliberately bypassed his statutory direct appeal. In addition, the Appellant has failed to provide this Court with sufficient reasons concerning why the grounds for relief asserted in his second application were not asserted or were insufficiently raised in prior proceedings. Appellant, therefore, has failed to show entitlement to relief in post-conviction proceedings. 22 O.S. 1991, § 1086.

(Ex. F attached to Respondent's response, doc. #6.)

In the present petition for a writ of habeas corpus, Petitioner again challenges his guilty pleas on the ground that he was denied the right to an appeal through no fault of his own. He alleges the sentencing court failed to advise him of his right to appointed counsel and to an appeal made at public expense, and his counsel was ineffective for failing to inquire if he wanted to appeal his guilty-plea convictions. Respondent has raised the defense of procedural default.

II. ANALYSIS

As a preliminary matter, the Court must determine whether Petitioner meets the exhaustion requirements of 28 U.S.C. § 2254(b) and (c). See Rose v. Lundy, 455 U.S. 509, 510 (1982). Exhaustion of a federal claim may be accomplished by either (a) showing the state's appellate court had an opportunity to rule on the same claim presented in federal court, or (b) that at the time he filed his federal petition, he had no available means for pursuing a review of his conviction in state court. White v. Meachum, 838 F.2d 1137, 1138 (10th Cir. 1988); see also Wallace v. Duckworth,

778 F.2d 1215, 1219 (7th Cir. 1985); Davis v. Wyrick, 766 F.2d 1197, 1204 (8th Cir. 1985), cert. denied, 475 U.S. 1020 (1986). The exhaustion doctrine is "'principally designed to protect the state courts' role in the enforcement of federal law and prevent disruption of state judicial proceedings.'" Harris v. Champion, 15 F.3d 1538, 1554 (10th Cir. 1994) (quoting Rose v. Lundy, 455 U.S. 509, 518 (1982)).

After reviewing the state court records attached to Respondent's Rule 5 Response, this Court finds that the Petitioner meets the exhaustion requirements under the law. The Court also finds that an evidentiary hearing is not necessary as the issues can be resolved on the basis of the record, see Townsend v. Sain, 372 U.S. 293, 318 (1963), overruled in part by Keeney v. Tamayo-Reyes, 501 U.S. 1 (1992).

The Court turns next to Respondent's argument that Petitioner is procedurally barred from asserting his claims in the present petition for a writ of habeas corpus because he failed to raise them in his first application for post-conviction relief. The doctrine of procedural default prohibits a federal court from considering a specific habeas claim where the state highest court declined to reach the merits of that claim on state procedural grounds, unless a petitioner "demonstrate[s] cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate[s] that failure to consider the claim[] will result in a fundamental miscarriage of justice." Coleman v. Thompson, 501 U.S. 722, 749-750 (1991); see also Gilbert v. Scott,

941 F.2d 1065, 1067-68 (10th Cir. 1991). The "cause and prejudice" standard applies to pro se prisoners just as it applies to prisoners represented by counsel. Rodriguez v. Maynard, 948 F.2d 684, 687 (10th Cir. 1991).

The cause standard requires a petitioner to "show that some objective factor external to the defense impeded . . . efforts to comply with the state procedural rules." Murray v. Carrier, 477 U.S. 478, 488 (1986). Examples of such external factors include the discovery of new evidence, a change in the law, and interference by state officials. Id. As for prejudice, a petitioner must show "'actual prejudice' resulting from the errors of which he complains." United States v. Frady, 456 U.S. 152, 168 (1982). A "fundamental miscarriage of justice" instead requires a petitioner to demonstrate that he is "actually innocent" of the crime of which he was convicted. McCleskey v. Zant, 499 U.S. 467, 494 (1991).

Petitioner does not dispute that he defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule. He argues, however, that the Rodriguez holding--that the "cause and prejudice" standard applies to pro se litigants just as it applies to litigants represented by counsel--"is unpersuasive in that [the Tenth Circuit Court of Appeals] did not consider that the cause and prejudice standard has only been applied where the defendant or prisoner is represented by counsel." (Petitioner's Brief, doc. #2, at 20.) Petitioner further argues that the Rodriguez opinion "did not take into account the Supreme

Court's recognition in Price v. Johnson, 334 U.S. 266, 292 (1948), that a more lenient standard is appropriate for pro se applicants; language that the [Supreme] Court did not repudiate in McClesky." (Petitioner's Brief, doc. #2, at 20.) In support of the latter proposition, Petitioner cites several opinions from the Fifth Circuit Court of Appeals, including Schouest v. Whitley, 927 F.2d 205 (5th Cir. 1991); Matthews v. Butler, 833 F.2d 1165, 1170-71 (5th Cir. 1987); Passman v. Blackburn, 797 F.2d 1335, 1344 (5th Cir. 1986), cert. denied, 480 U.S. 948 (1987); and Jones v. Estelle, 722 F.2d 159, 167 (5th Cir. 1983).

While Petitioner correctly cites these opinions for the proposition that the "actual knowledge" test and not the "cause and prejudice" test governs the abuse of the writ doctrine in the context of pro-se petitions, Petitioner overlooks the fact that on March 25, 1992, the Fifth Circuit Court of Appeals recognized that "McClesky has overruled these earlier decisions to the extent they distinguish, for abuse of the writ purposes, between pro se petitioners and those represented by counsel." Saahir v. Collins, 956 F.2d 115, 119 (5th Cir. 1992). "[W]here the State has no responsibility to ensure that the petitioner was represented by competent counsel [as in state post-conviction proceedings] . . . it is the petitioner who must bear the burden of a failure to follow state procedural rules." Coleman v. Thompson, 501 U.S. at 754. Therefore, since Petitioner had no sixth amendment right to counsel during the state post-conviction proceedings, he bears the burden of his failure to raise his claims in his first application

for post-conviction relief in compliance with 22 Okla. Stat. § 1086[1], and this Court cannot consider Petitioner's pro se status in determining whether he has shown cause for his procedural default. See McCoy v. Newsome, 953 F.2d 1252, 1258-59 (11th Cir.) (holding that petitioner's degree of education and lack of legal knowledge was not an external impediment to his defense in the state courts and did not provide cause for procedural default in state court on issues which he then sought to raise in federal habeas corpus petition, where he did subsequently assert them in other proceedings while still proceeding pro se), cert. denied, 112 S. Ct. 2283 (1992).

Applying the cause and prejudice standard to the facts of this case, the Court holds that Petitioner has failed to establish that the procedural default resulted from some objective factor external to his defense. Murray v. Carrier, 477 U.S. at 488. Petitioner relies solely on his ignorance of the law and pro se status which, as noted above, cannot constitute sufficient cause for his failure to raise his claims in his first application for post-conviction relief. Rodriguez v. Maynard, 948 F.2d at 687; see also United

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[1]Section 1086 reads as follows:

> All grounds for relief available to an applicant under this act must be raised in his original, supplemental or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the prior application.

States v. Flores, 981 F.2d 231 (5th Cir. 1993). Because Petitioner cannot show cause for his procedural default, this Court need not consider whether Petitioner can show prejudice.

Petitioner's only other means of gaining federal habeas review is a claim of actual innocence. Sawyer v. Whitley, 112 S. Ct. 2514, 2519-20 (1992). However, in his section 2254 petition, Petitioner does not claim actual innocence, but contests only his retained counsel's failure to file a direct appeal. Accordingly, this Court must conclude that Petitioner's federal habeas claims are procedurally barred.

Even assuming Petitioner can show sufficient cause and prejudice to excuse his failure to allege his claims in his first application for post-conviction relief, the Court concludes that Petitioner would not be entitled to habeas relief. Petitioner's primary contention is that he was denied an appeal through no fault of his own. He alleges that neither the trial court nor his retained counsel informed him of his right to appointed counsel on appeal and the right to an appeal free of cost. (Petitioner's brief, doc. #2, at 17.) Petitioner further argues that counsel "made no attempt to explain the pros and cons of an appeal to Petitioner nor did he inquire if Petitioner wanted to appeal his criminal conviction." (Id. at 15.)

The Court declines to review Petitioner's first claim--that the state court had a duty to advise him of his right to an appeal free of cost-- because it is based solely on the alleged violation

of state law.[2] See Hardiman v. Reynolds, 971 F.2d 500, 505 n.9 (10th Cir. 1992) (where court liberally construed the petition to assert a claim of ineffective assistance of counsel because petitioner's claim that the state court should have notified him of his right to an appeal free of cost was grounded only on Oklahoma law). It is well established that in a federal habeas corpus action, this Court is only concerned with whether a federal constitutional right was violated. 28 U.S.C. § 2254.

The standard governing Petitioner's claim of ineffective assistance of counsel is well established. Under Strickland v. Washington, 466 U.S. 668 (1984), to establish ineffective assistance of counsel, a petitioner must show that his counsel's performance was deficient and that the deficient performance prejudiced his defense. Id. at 687; Osborn v. Shillinger, 997 F.2d 1324, 1328 (10th Cir. 1993). A petitioner can establish the first prong by showing that counsel performed below the level expected from a reasonably competent attorney in criminal cases. Strickland, 466 U.S. at 687-88. "The proper standard for measuring attorney performance is reasonably effective assistance." Gillette v. Tansy, 17 F.3d 308, 310-311 (10th Cir. 1994) (quoting Laycock v. New Mexico, 880 F.2d 1184, 1187 (10th Cir. 1989)). In doing so, a court must "judge . . . [a] counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's

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[2]Petitioner relies on Copenhaver v. State, 431 P.2d 669 (Okla Crim. App. 1968); Jewel v. Tulsa County, 450 P.2d 833, 835 (Okla. Crim. App. 1967); and Rule 4.1 of the Rules of the Court of Criminal Appeals. (Petitioner's reply brief, doc. #7, at 2-3; see also Petitioner brief, doc. #2, at 7-8.)

conduct." Strickland, at 690. There is a "strong presumption [however,] that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 695.

To establish the second prong, a petitioner must show that this deficient performance prejudiced the defense, to the extent that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. See also Lockhart v. Fretwell, 113 S. Ct. 838, 842-44 (1993) (holding counsel's unprofessional errors must cause a trial to be "fundamentally unfair or unreliable"). There is no reason to address both components of the Strickland inquiry if the petitioner makes an insufficient showing on one. Strickland, 466 U.S. at 697.

Petitioner contends his retained counsel did not advise him that he could withdraw his guilty pleas or contact him during the ten-day period following sentencing to determine whether Petitioner wanted to move to withdraw the pleas. He also contends that counsel did not inform him that he had a right to appointed counsel on appeal and to an appeal free of cost. In response to these allegations, Respondent contends that the trial court advised Petitioner of the procedure to withdraw his guilty pleas and then file an appeal. Petitioner replies that "[m]erely advising a defendant of his right to appeal is 'insufficient to satisfy the right to counsel.'" Hardiman v. Reynolds, 971 F.2d at 506 (quoting Baker v. Kaiser, 929 F.2d 1495, 1499 (10th Cir. 1991). Counsel must explain the advantages and disadvantages of an appeal, advise

the defendant as to whether there are meritorious grounds for an appeal, and inquire whether the defendant wants to appeal his conviction. Baker, 929 F.2d at 1499-1500.

"An attorney [however] has not absolute duty in every case to advise a defendant of his limited right to appeal after a guilty plea." Laycock v. New Mexico, 880 F.2d 1184, 1187-88 (10th Cir. 1989) (citing Marrow v. United States, 772 F.2d 525, 527 (9th Cir. 1985); Carey v. Laverette, 605 F.2d 745, 746 (4th Cir.) (per curiam) (there is "no constitutional requirement that defendants must always be informed of their right to appeal following a guilty plea"), cert. denied, 444 U.S. 983 (1979)); see also Hardiman, 971 F.2d at 506; Castellanos v. United States, 26 F.3d 717 (7th Cir. 1994); Davis v. Wainwright, 462 F.2d 1354 (5th Cir. 1972). Only "[i]f a claim of error is made on constitutional grounds, which could result in setting aside the plea, or if the defendant inquires about an appeal right" does counsel have a duty to inform the defendant of his limited right to appeal a guilty plea. Laycock, 880 F.2d at 1188; see also Shaw v. Cody, No. 94-6172, 1995 WL 20425, *2 (10th Cir. Jan. 20, 1995) (unpublished opinion); Abels v. Kaiser, 913 F.2d 821, 823 (10th Cir. 1990) (counsel's failure to file a requested appellate brief, when he had not yet been relieved of his duties through a successful withdrawal, amounted to constitutionally ineffective assistance). "This duty arises when 'counsel either knows or should have learned of his client's claim or of the relevant facts giving rise to that claim.'" Hardiman, 971 F.2d at 506 (quoting Marrow v. United States, 772 F.2d 525, 529

(9th Cir. 1985)).

While Petitioner's constitutional right to counsel extended to the ten-day period following sentencing, see Baker v. Kaiser, 929 F.2d at 1499; Randall v. State, 861 P.2d 314, 316 (Okla. Crim. App. 1993) (where the Oklahoma Court of Criminal Appeals held that a hearing on an application to withdraw a guilty plea is a "critical stage" which invokes a defendant's constitutional right to counsel), there is no indication in the record that Petitioner attempted to contact his retained counsel or wanted his assistance during the ten-day period following sentencing. Cf. Baker, 929 F.2d at 1499. At sentencing, Petitioner expressed his desire to begin serving his sentences immediately, although the court advised him that he could choose to remain in the county jail during the pertinent ten-day period following the entry of the Judgment and Sentence. Moreover, the record reveals that Petitioner and his counsel were interested in seeking review of the sentence within 120 days of sentencing pursuant to 22 Okla. Stat. § 982a. (Sentencing Transcript at 4, attached as ex. E to Respondent's response, doc. #6.) Additionally, Petitioner did not file his first application for post-conviction relief for more than two years after sentencing, and his second application for post-conviction relief for another two years after the denial of his first application.

The only constitutional claim asserted by Petitioner is that

his retained counsel provided ineffective assistance of counsel.[3] Petitioner does not allege that during the pertinent time period counsel knew or had reason to know that Petitioner believed his assistance had been constitutionally inadequate. As noted above, counsel's duty to inform his client of his right to appeal a guilty plea arises only when "counsel either knows or should have learned of his client's claim or of the relevant facts giving rise to that claim." Hardiman v. Reynolds, 971 F.2d at 506. Petitioner's counsel had no duty to advise Petitioner of his right to appeal the guilty pleas absent any evidence demonstrating that counsel knew or should have known Petitioner believed his assistance was constitutionally inadequate. Laycock, 880 F.2d at 1188. Therefore, Petitioner's counsel did not provide constitutionally ineffective assistance in failing to inform or advise Petitioner of the right to an appeal free of cost and/or appointed counsel on appeal.

III. CONCLUSION

After carefully reviewing the record in this case, the Court finds that Petitioner has failed to show cause and prejudice or a fundamental miscarriage of justice to excuse his procedural default. In the alternative, the Court finds that Petitioner's counsel provided effective assistance of counsel and therefore that

[3]Petitioner's claim that his sentence was improperly enhanced under the provisions of 21 O.S. § 801 (alleged in his second application for post-conviction relief but abandoned on appeal) does not raise any constitutional concern.

Petitioner is not entitled to an out-of-time appeal.

The petition for a writ of habeas corpus (doc. #1) and Petitioner's motion for an evidentiary hearing (doc. #8) are hereby **denied**.

SO ORDERED THIS 28th day of Apr., 1995.

THOMAS R. BRETT, Chief Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

VOICE SYSTEMS AND SERVICES, INC.,	ENTERED ON DOCKET
Plaintiff/Counterclaim Defendant,	DATE MAY 01 1995
and	**Case No. 91-C-0088-K**
PETER ZUYUS,	92-C-389-K
Counterclaim Defendant,	FILED
v.	APR 1995
VMX, INC.,	Richard M. Lawrence, Clerk U. S. DISTRICT COURT NORTHERN DISTRICT OF OKLAHOMA
Defendant/Counterclaim Plaintiff.	

ORDER OF DISMISSAL

BEFORE the Court is the Motion of VMX, Inc., ("VMX") for Entry of Final Judgment. VMX asks the Court to make final the Preliminary Injunction entered by this Court on November 20, 1992, and to dismiss the claims asserted by Plaintiff/Counterclaim Defendant Voice Systems and Services, Inc. ("VSSI"), for failure to prosecute or otherwise take action herein. For the reason set forth below, VMX's Motion is sustained. The Preliminary Injunction is hereby made permanent, and the claims asserted by VSSI are dismissed.

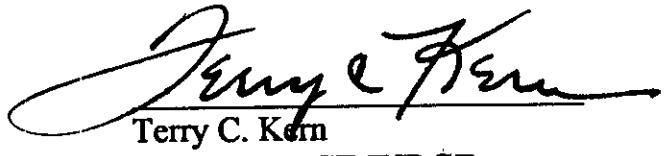
1. VSSI filed its Complaint for Declaratory Judgment of Noninfringement and Unfair Competition on February 12, 1991. Thereafter, VMX counterclaimed against VSSI and its owner, Peter Zuyus ("Zuyus"), for infringement of three patents. VMX sought temporary and permanent injunctive relief. VMX moved for preliminary injunction on May 8, 1992.

2. On September 29, 1992, and continuing on October 5-6, 1992, U.S. District Judge Thomas R. Brett conducted a full evidentiary hearing on VMX's motion for preliminary injunction. On November 5, 1992, the court entered its Findings of Fact and Conclusions of Law, holding that a preliminary injunction should issue in favor of VMX and against VSSI and Zuyus. Upon posting of an injunction bond by VMX, the Preliminary Injunction was entered on November 20, 1992.

3. Since entry of the Preliminary Injunction, neither VSSI nor Zuyus has indicated any intention or willingness to re-litigate the issues fully litigated in the preliminary injunction hearing in the fall of 1992. No party has attempted to take any discovery in nearly three years.

4. The lack of interest in proceeding with this matter is evident from the statements in the *Status Report From Plaintiff and Defendants*, filed with this Court on August 23, 1994. Therein, counsel for VSSI and Zuyus admitted they had not indicated any interest in further litigation of the issues in this action. (*Status Report*, ¶ ¶ 3, 11). The lack of prosecution is further indicated by the failure of VSSI or Zuyus to oppose VMX's motion.

Dismissal for want of prosecution is within the discretion of the trial court. *Link v. Wabash RR Co.*, 370 U.S. 626 (1962); *Food Basket, Inc. v. Albertson's Inc.*, 416 F.2d 937 (10th Cir., 1969). Whether a case should be dismissed for lack of prosecution will depend on the circumstances of the particular case. *Securities & Exchange Com'n v. Power Resources Corp.*, 495 F.2d 297, 298 (10th Cir. 1974). It is clear from the circumstances presented here that VSSI does not intend to pursue its claims. Accordingly, these claims are hereby dismissed with prejudice pursuant to Fed. R. Civ. P. 41(b) for failure to prosecute.



Terry C. Kern
U.S. DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

VOICE SYSTEMS AND SERVICES, INC.,	
Plaintiff/Counterclaim Defendant,	**Case No. 91-C-0088-K**
and	92C389K
PETER ZUYUS,	
Counterclaim Defendant,	
v.	
VMX, INC.,	
Defendant/Counterclaim Plaintiff.	

JUDGMENT OF PERMANENT INJUNCTION

IN ACCORDANCE with the Order entered contemporaneously herewith, Judgment of Permanent Injunction is hereby entered in favor of VMX, Inc., the Defendant/Counterclaim Plaintiff, and against Voice Systems and Services, Inc., Plaintiff/Counterclaim Defendant, and Peter Zuyus, Counterclaim Defendant, as set forth below.

NOW THEREFORE, Counterclaim-Defendants, Voice System and Services, Inc. and Peter Zuyus, and their respective officers, agents, servants, employees, and attorneys and all those persons in active concert or participation with them who receive actual notice of this order by personal service or otherwise, until further order of the Court, are hereby permanently restrained and enjoined from making, selling, using or reconstructing:

1. Voice mail and automated attendant products, or enhancements thereto, which fall within the scope of any of paragraphs 2 through 6 below and

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which have been, heretofore, advertised and sold under the names "Communicator," "Communicator Series," "Communicator, Jr.," "Quick-Call," or "Emergency Notification," except to the extent the same may be hereafter modified to be noninfringing after first being determined by this Court as noninfringing.

2. Any product that infringes U.S. Patent No. 4,371,752, U.S. Patent No. 4,783,796, or U.S. Patent No. 4,747,124, true copies of which patents are attached hereto and incorporated herein for all purposes.

3. Any voice mail system that infringes claims 1 and 21 of U.S. Patent No. 4,371,752.

4. Any automated attendant system that infringes claim 1 of U.S. Patent No. 4, 371,752.

5. Any automated attendant system that infringes claim 1 of U.S. Patent No. 4,747,124.

6. Any automated attendant product that infringes claim 5 of U.S. Patent No. 4,783,796.

The Findings of Fact and Conclusions of Law dated November 5, 1992 in this case are made final.

The principal and surety on the security required pursuant to the Preliminary Injunction are released, and such security is ordered returned.

IT IS SO ORDERED this 27 day of April, 1995.

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DOMINO'S PIZZA, INC., a Michigan corporation,

Plaintiff,

vs.

EL-TAN, INC., an Oklahoma corporation; MICHAEL A. ELLIS, an individual; DANNY TAN SHEAU YANG, an individual; OWASSO PIZZA, INC., an Oklahoma corporation; and WAYNE SALISBURY, an individual,

Defendants.

Case No. 95-C-180-B

DOMINO'S PIZZA, INC., a Michigan corporation,

Plaintiff,

vs.

B.A. ENTERPRISES, INC., an Oklahoma corporation; LEWIS WAYNE HUMBYRD, an individual; RONALD PREDL, an individual; JERRY EVANS, an individual;

Defendants.

Case No. 95-C-181-B

DOMINO'S PIZZA, INC., a Michigan corporation,

Plaintiff,

vs.

ELVIEANNA LYNNE POTTS, an individual,

Defendant.

Case No. 95-C-182-BU

O R D E R

In accordance with the Findings of Fact and Conclusions of Law entered this date, the Motion for a Preliminary Injunction, pursuant to Fed.R.Civ.P. 65, filed by Plaintiff Domino's Pizza, Inc., is hereby granted.

It is hereby ordered, adjudged and decreed that Defendants, their agents, servants, employees and all persons acting by or under their authority or in concert with them are enjoined:

1. From participating in the pizza carry-out and/or delivery business at the sites of their former Domino's franchises, or within 10 miles thereof, for one year;

2. From refusing to assign the leases to the former Domino's sites to Domino's; and

3. From refusing to turn over to Domino's any customer lists developed during operation of the franchises. Defendants may retain copies thereof, but may not employ them in a manner that violates the terms of this Preliminary Injunction. In this regard, see the letter written to Defendants by Domino's dated May 9, 1994.

Further, the provisions of the Temporary Restraining Order filed by this Court on February 28, 1995, are incorporated herein. Said bond shall remain in force and effect as well.

Defendants are granted until midnight Sunday, May 7, 1995, to fully comply with the above.

IT IS SO ORDERED, THIS 28th DAY OF APRIL, 1995.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

RONNIE LEE ARCHER, Plaintiff,	)	
v.	)	CASE NO. 94 C 553 E
BW/IP INTERNATIONAL, INC., a Delaware Corporation, Defendant.	)	
v.	)	
SEBASTIAN EQUIPMENT COMPANY, a Missouri Corporation, Third-Party Defendant.	)	

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ORDER OF DISMISSAL

It is hereby ordered that Plaintiff's Complaint against the Defendant, BW/IP International, Inc., is hereby dismissed with prejudice to its refiling. This Dismissal is only as to the Plaintiff's Complaint and the Third-Party Complaint still remains pending before this court.

s/ TERRY C. KERN

JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OKLAHOMA

ROBERT B. REICH, Secretary of Labor, United States Department of Labor, Plaintiff, v. LOCAL 76, UNITED FOOD AND COMMERCIAL WORKERS UNION, AFL-CIO Defendant.	)	Civil Action No. 94-C-331-K

PROPOSED JUDGMENT

Before the Court is the **Plaintiff's Motion For Approval of Certification of Election Results and For Final Judgment.** Having considered the substance of the Motion as well as the previously filed Stipulation of Settlement and Consent Judgment, the Court hereby **ADJUDGES, ORDERS,** and **DECREES** that

The following named candidates have been duly elected to the offices designated:

President	Jack Stogsdill
Secretary/Treasurer	Bobby McIntosh, Jr.
Recorder	Cheryl Philpot
1st Vice President	David Crittenden
2nd Vice President	Ray White
3rd Vice President	Gracie Morrow
4th Vice President	Shirley Hicks
5th Vice President	Gary Fraley
6th Vice President	Mary Young
7th Vice President	Bill Brewer
8th Vice President	Janice Jennings

AND FURTHER ADJUDGES, ORDERS and DECREES that each party shall bear its own costs, including attorney's fees.

SIGNED AND ENTERED this 28 day of April, 1995.

s/ TERRY C. KERN

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

KENNETH FISHER and CONNIE FISHER, husband and wife,

Plaintiffs,

vs

HARTFORD INSURANCE GROUP, a foreign corporation,

Defendant.

Case No. 94-C-777-K

ORDER

NOW on this 28 day of April, 1995, the Joint Application of Dismissal is hereby granted.

s/ TERRY C. KERN

JUDGE OF THE DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MICHAEL EBEL,

Plaintiff,

vs.

DEWEY JOHNSON, et al.,

Defendants.

No. 93-C-1036-K

ORDER

On February 1, 1995, the jury rendered a verdict in the above-captioned case. The jury found the Defendants liable to the Plaintiff in their official capacities only and awarded damages of $187,503.27. The Plaintiff, Michael Ebel, received severe burns on his legs while confined at the Rogers County Jail. He claimed that Defendants deprived him of his constitutional rights when they placed him in the south cell block notwithstanding his highly intoxicated condition.

Now before the Court are various post-trial motions for consideration. They include: Defendants' Motion for Judgment Notwithstanding the Verdict or, in the Alternative, for New trial; Plaintiff's Motion for Judgment as a Matter of Law as to Individual Liability and Motion for New Trial on Punitive Damages; and Plaintiff's Motion for Prejudgment Interest.

The Defendants have styled their motion as a Motion for Judgment Notwithstanding the Verdict or, in the Alternative, for New Trial. (Docket #85). Despite the use of the phrase "judgment notwithstanding the verdict," Defendants clearly intend for this

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Court to view their effort as a Motion for Judgment as a Matter of Law pursuant to Fed.R.Civ.P. 50. Similarly, Plaintiff's motion is made pursuant to F.R.C.P. 50. A motion under Rule 50 is properly granted "only if, viewing the evidence in the light most favorable to the non-moving party, all the evidence and inferences to be drawn from it are so clear that reasonable persons could not differ in their conclusions." Bacchus Indus., Inc. v. Arvin Indus., Inc., 939 F.2d 887, 893 (10th Cir. 1991). Defendants also move for a new trial under Fed.R.Civ.P. 59. A motion for new trial will be granted only if the verdict is clearly, decidedly or overwhelmingly against the weight of the evidence. Brown v. McGraw-Edison Co., 736 F.2d 609, 616 (10th Cir. 1984).

I. Defendants' Motion for Judgment as Matter of Law

In moving for judgment as a matter of law, the Defendants believe that no reasonable person could conclude that the Plaintiff was treated in an unconstitutional manner. Ebel was a pretrial detainee who had been arrested for driving while intoxicated. When booked into the jail, he was placed in the south cell block, a part of the facility that contained convicted criminals awaiting transfer to maximum security facilities, rather than the drunk tank or the empty female cell. During the night, other prisoners placed toilet paper up the pant legs of the Plaintiff and set him on fire. The evidence revealed that the policy utilized by the Rogers County Sheriff's Department was to place those charged with intoxication offenses in the drunk tank when space was available. If space was not available, the policy allowed jailers to place such persons in

any open cell. When Plaintiff was booked, he had a blood alcohol level of approximately .25 percent. Plaintiff argued that the placement decision by jail officials came as a result of official county policy and placed him at substantial risk of serious harm.

The facts presented at trial would allow a reasonable person to conclude that Plaintiff's constitutional rights were violated. As a pretrial detainee, Ebel was protected by the Fourteenth Amendment. The Fourteenth Amendment provides to pretrial detainees at least as much protection as convicted prisoners receive under the Eighth Amendment. As articulated in the seminal case of Estelle v. Gamble, 429 U.S. 97 (1976), the Eighth Amendment protects prisoners from "deliberate indifference" to their constitutional rights. While courts have struggled to give a practical meaning to the deliberate indifference standard, the Tenth Circuit has uniformly held that more than mere negligence is required to meet the deliberate indifference standard. Berry v. City of Muskogee, 900 F.2d 1489, 1494.

The Supreme Court's most recent attempt to clarify the deliberate indifference standard came in a context quite similar to Ebel's. In Farmer v. Brennan, 114 S.Ct. 1970 (1994), the Court discussed the applicability of the Eighth Amendment to the claims of a transsexual prisoner who argued that his rights were violated when prison officials exposed him to a general prison population despite knowledge that the prisoner was vulnerable to violent attack by other prisoners. The Supreme Court summarized the law's development in this area, citing the uniform view of the district

courts that prison officials have a duty to protect prisoners from violence at the hands of other prisoners. See Cortes-Quinones v. Jimenez-Nettleship, 842 F.2d 556, 558 (1st. Cir. 1988), cert. denied 488 U.S. 823 (1988). The Supreme Court reiterated its commitment to the "deliberate indifference" standard first articulated in Estelle, 429 U.S. 97 (1976). While clarified in Farmer, the standard spelled out by the Court was not new. In fact, the Court stated that its enunciation of the standard was consistent with its earlier decision in Wilson v. Seiter, 501 U.S. 294 (1991). Although the Farmer decision was handed down subsequent to the events precipitating the instant lawsuit, the deliberate indifference standard was established, although ill-defined, at the time the violation occurred.

In defining deliberate indifference, the Farmer Court held that a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health and safety. The Court stated:

> [I]f an Eighth Amendment plaintiff presents evidence showing that a substantial risk of inmate attacks was "longstanding, persuasive, well-documented, or expressly noted by prison officials in the past, and the circumstances suggest that the defendant-official being sued has been exposed to information concerning the risk, and thus 'must have known' about it, then such evidence could be sufficient to permit a trier of fact to find that the defendant-official had actual knowledge of the risk."

Farmer, 114 S.Ct at 1981-82. From cases such as Estelle, Wilson, and Farmer, the Court instructed the jury as to the content of the deliberate indifference standard. The instruction provided:

> IN ORDER TO PROVE HIS CLAIM THAT HE WAS TREATED WITH DELIBERATE INDIFFERENCE, PLAINTIFF MUST ESTABLISH BY A PREPONDERANCE OF THE EVIDENCE THE FOLLOWING:
>
> 1) DEFENDANTS KNEW THE PLAINTIFF FACED A SUBSTANTIAL RISK OF SERIOUS HARM;
>
> 2) DEFENDANTS DISREGARDED THAT RISK BY FAILING TO TAKE REASONABLE MEASURES TO AVERT THE HARM;
>
> 3) DEFENDANTS' CONDUCT WAS THE PROXIMATE CAUSE OF INJURY AND CONSEQUENT DAMAGE TO THE PLAINTIFF.

This instruction enabled the jury to assess whether the Plaintiff's rights were violated. The instructions also enabled the jury to evaluate whether that deprivation was attributable to county policy.[1]

The jury reached its conclusion after considering all the evidence presented in the case and the inferences drawn from that evidence. Plaintiff presented evidence showing: a policy of placing intoxicated persons in any open cell if space was not available in the drunk tank; the dangerous nature of the south cell block; the integration of convicted criminals with pre-trial detainees; availability of space in the empty female cell; potential availability of the trustee room; the need for better monitoring of the jail; Ebel's high level of drunkenness and incapacity; and knowledge by jail officials of other "hot foot" incidents. Given the evidence presented, it was a reasonable conclusion that the Plaintiff was subjected to unconstitutional conduct by the Defendants in their official capacities and therefore deserved a judgment in his favor.

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[1] See Section II(c).

II. Defendants' Motion for New Trial

In the alternative, Defendants ask this Court for a new trial as to Plaintiff's claims against Johnson and Hicks in their official capacities. Such a motion is made to invoke the discretion of the trial court when it is shown that the verdict is against the weight of the evidence or that the trial was not fair to the movant. Day v. Amax Inc., 701 F.2d 1258, 1262-63 (8th Cir. 1983). Defendants provide the following reasons to justify retrial: a) the jury verdict against the county was against the weight of evidence; b) the jury awarded excessive damages; c) the Court improperly instructed the jury; d) the Court committed error in the admission and rejection of evidence; e) closing argument of Plaintiff's counsel was prejudicial.

A. Verdict Against Weight of Evidence

Defendants submit that the jury verdict against Johnson and Hicks in their official capacities was against the clear weight of the evidence. They point to the deficiencies in the credibility of Trustee Purcell, the weight of expert testimony from Louis Bullock, and the reasonableness of their decision to place Plaintiff in the south cell block. All of these issues were weighed by the jury and dealt with in a responsible manner. This Court will not substitute its own factual assessments for the jury's.

In this section of their argument, Defendants point to Meade v. Grubbs, 841 F.2d 1512, 1529 (10th Cir. 1988) in urging this Court to accept the view that, in order for official liability to

attach, the policy itself must be unconstitutional. However, § 1983 is not concerned with the *per se* constitutionality of a policy but the nature of the harm suffered by a person as a result of a particular policy. For that reason, the Supreme Court in Monell v. New York City Dept. of Social Services, 436 U.S. 658, 691 (1976), stated, "Congress did not intend municipalities to be held liable unless action pursuant to official policy of some nature caused a constitutional tort." While it is not necessary that the policy be unconstitutional in and of itself, there must be an affirmative link between a policy and a constitutional deprivation in order for official liability to attach. The sheriff's department of Rogers County is liable if it is shown that action taken pursuant to official municipal policy caused a constitutional tort and there is a direct causal link between a municipal policy and the alleged constitutional deprivation. Harris v. Williams, 33 F.3d 62, 1994 WL 446772, No. 93-7109 (10th Cir. 1994) (unpublished opinion).

Given the policies established by the evidence at trial, a reasonable juror could have found such a link. Here, the policy of limited segregation for intoxicated prisoners was clearly established by decisionmakers for Rogers County and reasonably understood to be the proximate cause of the injury suffered by Plaintiff. Unlike the *failure to train* context, Plaintiff need not point to numerous incidents from which to infer official policy of a failure to train. The Supreme Court has squarely held that "municipal liability may be imposed for a single decision under appropriate circumstances." Pembauer v. City of Cincinnati, 475

U.S. 469, 480 (1986). "If the decision to adopt that particular course of action is properly made by that government's authorized decisionmakers, it surely represents an act of official government 'policy' as that term is commonly understood." Id. at 481.

B. Excessive Damages

The damages awarded by the jury were not excessive. Plaintiff suffered severe burns on both legs, requiring skin grafts and careful medical attention. The injuries also caused disfigurement. Given the medical damage and the pain and suffering to which the Plaintiff testified, the damages awarded to the Plaintiff of $187,503.27 were not excessive. Such an evaluation is squarely within the discretion of the trial court. See Brown v. Richard H. Wacholz, 467 F.2d 18 (10th Cir. 1972). During the trial, extensive evidence was presented as to the scope of the damages, the pain caused by the burning and by the treatment that followed, as well as by the suffering produced as a result of the incident. Although the recovery was not insubstantial, it was not excessive. Therefore, this Court will not order a new trial based on this reason.

C. Jury Instructions

Defendants challenge the accuracy of the jury instructions on numerous grounds. The jury instructions in this case derived largely from the case law arising from the progeny of Estelle as well as the recent Supreme Court decision in Farmer. As this

Court ruled in handling the summary judgment motion, liability required a higher standard to be breached than the Fourth Amendment reasonableness standard used to examine excessive force by police officers.[2]

In fashioning the final instructions, the Court reviewed various expressions of the deliberate indifference standard as well as the distinction between individual and official capacity liability. In addition, this Court incorporated an instruction for a defense based on reasonableness in light of the principles articulated in Bell v. Wolfish, 441 U.S. 520, 547-548 (1979). This instruction allowed Defendants to escape liability if their actions were found to be reasonable.

Defendants sought an instruction that would have been highly favorable to Defendants, telling the jurors that the expert judgment of jail officials should be deferred to in the absence of substantial evidence that officials have exaggerated their response to needs in jail management. Defendants' Amended Jury Instructions, (Docket #80). While Defendants' proposed instruction may be based in Bell, this Court determined that such a statement of the law, if accurate, is more appropriate in litigation involving the overall management of prisons--as was the situation in Bell--rather than in the context of an alleged violation of the

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[2] In the summary judgment order, this Court determined that whether the test to be used was the deliberate indifference test under Farmer or the reasonable prison objectives framework under Bell v. Wolfish, 441 U.S. 520 (1979), there were issues of fact as to whether the Fourteenth Amendment rights of the Plaintiff, a pretrial detainee, had been violated.

civil rights of a single individual. This Court ultimately decided not to submit the proposed instruction under Bell that was offered by the Defendants. In this Court's view, the Farmer case was much more similar to the context at hand than the comprehensive class action litigation analyzed under Bell. Furthermore, the instruction given properly allowed the jury to factor in the reasonableness of the incarceration objectives that prison officials must consider. Under the instruction, Plaintiff needed to show that Defendants failed to take reasonable measures to avert the harm that the Plaintiff faced. In other words, had the Defendants known of a substantial risk of serious harm to the Plaintiff but taken reasonable measures to avert that harm, there could be no finding of liability.[3]

The challenged instruction used by the Court stated:

> AN OFFICIAL MAY BE HELD LIABLE IN HIS INDIVIDUAL OR OFFICIAL CAPACITY FOR DEPRIVING PLAINTIFF OF HIS CONSTITUTIONAL RIGHTS BY ACTING WITH DELIBERATE INDIFFERENCE TO THE PLAINTIFF'S HEALTH AND SAFETY. IN ORDER TO PROVE HIS CLAIM THAT HE WAS TREATED WITH DELIBERATE INDIFFERENCE, PLAINTIFF MUST ESTABLISH BY A PREPONDERANCE OF THE EVIDENCE THE FOLLOWING:
>
> 1) DEFENDANTS KNEW THE PLAINTIFF FACED A SUBSTANTIAL RISK OF SERIOUS HARM;
>
> *2) DEFENDANTS DISREGARDED THAT RISK BY FAILING TO TAKE REASONABLE MEASURES TO AVERT THE HARM;*
>
> 3) DEFENDANTS' CONDUCT WAS THE PROXIMATE CAUSE OF INJURY AND CONSEQUENT DAMAGE TO THE PLAINTIFF.

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[3] Defendants cannot claim any type of surprise by the Court's use of Farmer in developing jury instructions. Despite the fact that the summary judgment order devoted more time and space to the Bell v. Wolfish decision, Farmer was discussed in the summary judgment order, each pretrial conference, as well as in several bench conferences during the course of the trial.

. . .

> IN ORDER FOR A DEFENDANT TO BE FOUND LIABLE IN HIS OFFICIAL CAPACITY, THE PLAINTIFF MUST SHOW THAT PLAINTIFF'S CONSTITUTIONAL RIGHTS WERE VIOLATED AND THAT THE COUNTY POLICY OR CUSTOM OF THE ENTITY OF WHICH THE OFFICIAL IS AN AGENT WAS THE PROXIMATE CAUSE OF THE CONSTITUTIONAL VIOLATION ALLEGED. YOU ARE INSTRUCTED THAT SHERIFF JOHNSON AND UNDERSHERIFF HICKS WERE AGENTS OF THE ROGERS COUNTY SHERIFF'S DEPARTMENT.
> TO FIND A DEFENDANT LIABLE IN HIS OFFICIAL CAPACITY, PLAINTIFF MUST ALSO SHOW A DIRECT CAUSAL LINK BETWEEN THE POLICY OR CUSTOM AND THE ALLEGED CONSTITUTIONAL VIOLATION.

(emphasis added).

Defendants argue that the instructions should not have relied on Farmer, since that case was decided subsequent to the events at issue. However, Farmer simply articulates the principles set forth in Estelle. It is not a new constitutional standard. While some courts had used an objective test in assessing deliberate indifference, a subjective component was incorporated into the constitutional standard by the Supreme Court's decision as early as Wilson v. Seiter.[4] Moreover, the subjective test used in the instruction was a higher hurdle for the Plaintiff than the objective test the Defendants now seem to support.

Additionally, Defendants assert that the instructions were in error because they should have been structured so as to have

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[4] Justice Scalia noted that the case law under cruel and unusual punishment clause of the Eighth Amendment mandated "inquiry into a prison official's state of mind when it is claimed that the official has inflicted cruel and unusual punishment." 501 U.S. at 299. The Court has not resolved the dilemma of applying the subjective element of the test to municipal entities. In this case, there was evidence that policy-makers possessed information that prison policy placed at risk vulnerable inmates to the specific type of harm suffered by Plaintiff. Therefore, this Court believes that the governmental entity was reasonably found to be deliberately indifferent to Plaintiff's rights.

separate instructions for official capacity liability and personal capacity liability. Not only were the instructions clear in this regard, but the parties agreed in the jury instruction conference to consolidating these two elements in order to avoid confusion to the jury.

Defendants have also filed a supplement to their Motion for a New Trial. Although such a supplement is not contemplated by the Federal Rules of Civil Procedure or the Local Rules of the Northern District, the Court will briefly deal with the argument posed there with regard to the jury instructions. Defendants cite Zuchel v. City and County of Denver, 997 F.2d 730 (10th Cir. 1993) to state that the plaintiff is required first to establish that acts of lower-level officers were unconstitutional before finding liability against the governmental entity. The instruction in this case required the jury to find that Plaintiff suffered a constitutional violation at the hands of jail personnel imputing liability to the government entity. Therefore, the instruction given is consistent with, not contrary to, Zuchel in the context for which that case has been raised by the Defendants.

D. Error in Admission & Rejection of Evidence

Defendants also point to numerous evidentiary rulings by the court in its motion for a retrial. First, they argue that Louis Bullock should not have been allowed to testify as an expert. Under Federal Rule of Evidence 702, a witness may qualify as an expert if the witness possesses sufficient "knowledge, skill,

experience, training, or education." Although Mr. Bullock was not formally trained in prison administration, his career has involved hundreds of hours in the close study of prison operations. From the standpoint of knowledge, skill, and experience, Mr. Bullock was properly qualified as an expert. In addition, the Defendants aggressively cross-examined Mr. Bullock in order to identify any weaknesses in background that could affect the weight of his testimony.

Plaintiff's counsel elicited testimony from Plaintiff and others relating to the medical treatment received by Plaintiff subsequent to the burning incident. While no constitutional claim remained in the lawsuit for denial of medical care subsequent to this Court's summary judgment ruling, this evidence was relevant as to Plaintiff's claim for damages due to pain and suffering. Moreover, the evidence presented in this regard was not unlimited but rather was regulated by the Court to bear only on damages rather than on a new constitutional claim for improper medical care. In light of its relevance to the issue of damages, this evidence was properly admitted under the Federal Rules of Evidence.

The Defendants assert that the Court improperly excluded evidence of Plaintiff's alcohol tolerance and improperly prevented witness Brad Cooper from testifying. This Court excluded evidence of Plaintiff's drinking habits, prior drunk driving arrest, and alcohol tolerance because the probative value was substantially outweighed by the danger of unfair prejudice. F.R.E. 403. Defendants were able to introduce substantial evidence to buttress

their argument that Mr. Ebel was functioning in a lucid manner despite the fact he had a blood alcohol level of approximately .25 percent. Even without speculative evidence about alcohol tolerance, Defendants were allowed to explore fully--in front of the jury--Plaintiff's capacity to function despite a blood-alcohol rate that would normally suggest severe impairment. This evidence enabled the jury to make all the relevant inferences as to Plaintiff's vulnerability to violent attack. Alcohol tolerance could not have assisted the jury significantly in making the determination of Plaintiff's vulnerability. Furthermore, the evidence could have had the prejudicial effect of encouraging the jury members to focus on Plaintiff's drinking habits rather than his treatment at the jail on the morning in question.

Lastly, the Court did not allow Brad Cooper to testify, because he was not listed on the pretrial order or any earlier witness lists.[5] According to Local Rule 16.2(L), additional witnesses listed after the witness exchange date will be permitted to testify only in order to prevent manifest injustice and only then if proper notice is given to the other party in a written motion requesting permission to supplement the witness list. No such showing was made by the Defendants and therefore the Court

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[5] The parties were almost incapable of agreeing to a Pretrial Order. Ultimately, the Court accepted as the Pretrial Order the document listed as Exhibit B to Plaintiff's Application for Suitable Relief on Pre-Trial Order and/or For Citation for Contempt of Court. The Pre-Trial Order reflected stipulations and admissions in the December 5, 1994 proposed Pre-Trial Order and the various decisions made by the Court during conferences with counsel.

properly precluded Brad Cooper from testifying.

E. Closing Argument Was Extraneous and Prejudicial

The trial court has considerable discretion in determining whether conduct by counsel is so prejudicial as to require a new trial. Draper v. Airco, Inc., 580 F.2d 91, 94 (3rd Cir. 1978). Defendants allege that the closing argument by Plaintiff's counsel overstepped proper bounds when he asked jurors to consider how the attorney for Defendants would have reacted had his wife been injured in the manner that Plaintiff was injured. Plaintiff's counsel also made similar reference to a hypothetical "millionaire" that may have led jury members to believe Plaintiff's counsel was referring to the attorney for the Defendants.

In evaluating the cumulative effect of these comments by Plaintiff's Counsel, this Court does not believe that the jury's verdict was prejudiced by such statements. "A new trial may be required only if the moving party shows that it was prejudiced by the attorney misconduct." Angelo v. Armstrong World Industries, Inc., 11 F.3d 957, 962 (10th Cir. 1993). Even if improper, the comments were sufficiently hypothetical and generic that they do not require this Court to order a new trial.

Defendants also argue that counsel for Plaintiff improperly referred to the non-presence and non-testimony of Deputy Brad Cooper, the officer who took Plaintiff to Dr. Stauffer, and to a third trustee present at the jail during the morning in question. By doing so, Plaintiff allegedly intimated that Defendants were

involved in a cover-up of the events in question. In response, Plaintiff's counsel says there was no reference to Brad Cooper, but rather to Jerry Kelley, the jailer who first spoke to Mr. Ebel. Also, Plaintiff's counsel says he does not recall any reference to a third trustee. In any event, Defendants did not make any objections during the closing arguments addressed to this point. They only raised the objection in this subsequent motion for a new trial. As the First Circuit has stated, "[A] party may not wait and see whether the verdict is favorable before deciding to object." Computer Sys. Eng'g, Inc. v. Qantel Corp., 740 F.2d 59, 69 (1st Cir. 1984). Because of the lateness of this motion as well as the absence of any prejudicial effect, the motion is denied with respect to comments made about other staff members or trustees of the jail.

Lastly, Defendants complain that Plaintiff's counsel referred to Plaintiff's former DUI in his closing argument. Plaintiff's counsel implied that counsel for Defendants could not produce the evidence he promised in his opening statement regarding the DUI conviction. This argument was improper and had a potential for prejudice given the fact that DUI evidence had been prohibited by the Court. Its absence was a direct result of rulings from the Court, not of a lack of such evidence.

However, counsel for the Defendants made no objection to this argument before the jury went to deliberate. Had such an objection been offered, the Court might have provided an additional curative instruction at that point to prevent any potential prejudicial

effect. In explaining his failure to object during trial, counsel for the Defendants says he was precluded from so doing in light of the Order by the Court prohibiting any references to a DUI conviction. (Docket #82). Surely, counsel could not have interpreted that Order to prevent him from objecting when the other party made an improper reference to the DUI. Had counsel for Defendants truly believed he could not even mention the DUI in front of the jury for purposes of making an objection, he could have asked to make the objection out of the presence or hearing of the jury.

Although no curative was offered at this point to counteract Plaintiff's remark about the DUI, this remark did not have a prejudicial impact on the jury. In the Court's instructions to the jury at the end of the case, the Court stated:

> ARGUMENTS AND STATEMENTS BY LAWYERS ARE NOT EVIDENCE. THE LAWYERS ARE NOT WITNESSES. WHAT THEY HAVE SAID IN THEIR OPENING STATEMENTS, CLOSING ARGUMENTS AND AT OTHER TIMES IS INTENDED TO HELP YOU INTERPRET THE EVIDENCE, BUT IT IS NOT EVIDENCE. IF THE FACTS AS YOU REMEMBER THEM DIFFER FROM THE WAY THE LAWYERS HAVE STATED THEM, YOUR MEMORY OF THEM CONTROLS.

Given this instruction provided by the Court and the weight of the evidence in the case, this Court does not believe that reference to the DUI by Plaintiff's counsel played a prejudicial role in the jury's deliberations. Furthermore, the lateness of the objection weighs against a determination that the comment should merit a new trial for the Defendants.

III. Plaintiff's Motion for Judgment as Matter of Law

The Plaintiff has filed a post-trial motion pursuant to Fed.R.Civ.P 50. The pleading is styled as Plaintiff's Motion and Brief for Judgment as a Matter of Law as to Individual Liability of Mr. Johnson and Mr. Hicks and Motion for New Trial on the Issue of Punitive Damages Only. The request for a new trial on the issue of punitive damages need only be addressed if this Court agrees that individual liability in this case flows directly from official liability as is argued by the Plaintiff.

The essence of Plaintiff's motion is that the inevitable consequence of the verdict against Defendants in their official capacities is a verdict against Defendants also in their individual capacities. However, this result is neither compelled by logic or the evidence presented in this case. The instructions provided to the jury distinguished between individual and official liability. The instruction defining individual liability stated:

> YOU MAY FIND THE DEFENDANTS LIABLE IN THEIR INDIVIDUAL CAPACITIES AS A RESULT OF THEIR SUPERVISORY ROLE AT THE JAIL. IN ORDER TO FIND DEFENDANTS LIABLE IN THEIR INDIVIDUAL CAPACITIES AS SUPERVISORS, THE PLAINTIFF MUST SHOW THAT THIS INDIVIDUAL EITHER ENCOURAGED THE SPECIFIC INCIDENT OF MISCONDUCT, ACQUIESCED IN THE CONSTITUTIONAL VIOLATION, OR IN SOME OTHER WAY DIRECTLY PARTICIPATED IN IT. AT A MINIMUM, PLAINTIFF MUST SHOW THAT THE DEFENDANT AT LEAST OFFICIALLY AUTHORIZED, APPROVED, OR KNOWINGLY ACQUIESCED IN THE UNCONSTITUTIONAL CONDUCT OF THE OFFENDING OFFICERS. PERSONAL PARTICIPATION IN THE IMMEDIATE ACT WHICH VIOLATED THE PLAINTIFF'S RIGHTS IS NOT REQUIRED, BUT THERE MUST BE AN AFFIRMATIVE LINK BETWEEN THE SUPERVISOR AND THE SUBORDINATE TO SHOW THE SUPERVISOR'S AUTHORIZATION OR APPROVAL OF THE CONSTITUTIONAL INJURY.

The instruction defining official liability was set forth earlier in this Order.[6] Suits against county employees in their

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[6] Supra Section II(c).

official capacity are tantamount to suits against the public entity for which they work. Watson v. City of Kansas City, 857 F.2d 690, 695 (10th Cir. 1988).

While finding that official liability existed, the jury very reasonably concluded that Sheriff Johnson and Undersheriff Hicks were not individually liable for the constitutional violations that took place at the Rogers County Jail. If such a choice was not possible for the jurors, the distinction between official and individual liability would be meaningless. In Garcia v. Salt Lake County, 768 F.2d 303 (10th Cir. 1985), the Tenth Circuit reviewed a jury verdict in a §1983 case involving denial of medical care. The jury released from liability all of the individual defendants but still found Salt Lake County liable. In upholding the verdict, the Tenth Circuit recognized that "[a]lthough the acts or omissions of no one employee may violate an individual's constitutional rights, the combined acts or omissions of several employees acting under a governmental policy or custom may violate an individual's constitutional rights." Id. at 310.

Contrary to the assertions of Plaintiff's counsel, Defendants need not be liable in their individual capacity simply because policies of the Department caused the constitutional injury suffered by Plaintiff. According to the instruction and the case law in the Tenth Circuit, there must be direct participation or an affirmative link between *individual actions* of the Defendants and the injury for individual liability as opposed to an affirmative link between *official policy* and the injury suffered for official

liability. In this situation, the jury very reasonably found the proper nexus missing between the injuries suffered and the particular actions of the Defendants. In fact, neither Defendant was at the jail on the morning that Plaintiff was brought to the jail. While the jail policy may have been responsible for the injury, there was very little evidence to suggest that the Defendants, in their individual capacities, acquiesced in the specific commission of this violation.

Although Oklahoma law makes sheriffs responsible for the torts of their subordinates, this does not mean that §1983 liability must necessarily attach to Sheriff Johnson for the constitutional deprivation suffered by Plaintiff. If the Oklahoma statutes worked in such a fashion, the sheriff would be responsible for civil rights violations under a respondeat superior theory of liability. However, the courts have uniformly rejected such an approach. Kaiser v. Lief, 874 F.2d 732, 736 (1989). Therefore, this Court disagrees with the view that individual liability for either or both Defendants is required. Therefore, Plaintiff's motion for judgment as a matter of law is denied.

Necessarily, Plaintiff's motion for a new trial on the issue of punitive damages is also denied.

IV. Prejudgment Interest

The Plaintiff has moved for an assessment of prejudgment interest on the amount of the jury verdict from the date of the filing of the Complaint on November 19, 1993 through the date of the judgment. Although § 1983 contains no provision regarding

prejudgment interest, the purpose of a § 1983 damages award is to compensate a plaintiff for injuries caused by a violation of his or her constitutional rights. Therefore, many courts have allowed prejudgment interest as an element of compensation in § 1983 actions. See Golden State Transit v. City of Los Angeles, 773 F. Supp. 204, 208-216 (C.D. Cal. 1991) (surveying availability of prejudgment interest in several federal circuits).

A. Two-Part Test

The Tenth Circuit has recently addressed the awarding of prejudgment interest in a § 1983 context in the case of Zuchel v. City and County of Denver, Colo., 997 F.2d 730 (10th Cir. 1993). In allowing for such an award, the Court stated:

> The award of prejudgment interest under federal law "is to compensate the wronged party for being deprived of the monetary value of his loss from the time of the loss to the payment of the judgment."

Id. at 746 (citing U.S. Industries Inc. v. Touche Ross & Co., 854 F.2d 1223, 1256 (10th Cir. 1988). The decision whether or not to allow prejudgment interest rests within the sound discretion of the trial court. U.S. Industries, 854 F.2d at 1255, n.43. Although prejudgment interest is normally available in a federal case, it is not a matter of right. Id.

The Tenth Circuit in Zuchel set forth a two-step process for awarding prejudgment interest. First, this Court must determine whether an award of prejudgment interest would serve to compensate the injured party. Second, the Court must also determine whether the equities of the case would preclude the award of prejudgment

interest.

In evaluating these two issues, this Court determines that an award of prejudgment interest is appropriate. First, the interest would serve the objective of compensation. The Plaintiff experienced medical injuries, disfigurement, medical expenses, as well as pain and suffering. Had the Defendants compensated Plaintiff immediately for his injuries, the Plaintiff would have had the benefit of the interest earned from that compensation. Plaintiff was deprived of the monetary value of his injury during this period and deserves compensation for this deprivation in order to make him "whole." The injuries suffered were not hypothetical or intangible but obvious and severe. The fact that Plaintiff did not recover for lost wages does not negate the compensatory role of prejudgment interest in this action.

Moreover, the equities do not preclude the award of prejudgment interest. Plaintiff was not a convicted criminal. He was a pretrial detainee, highly vulnerable due to his level of intoxication, who was placed in a dangerous part of the jail despite available space in safer areas of the facility. As a result, he sustained serious injuries that were only exacerbated by the treatment he received by jail officials. Moreover, there is no reason to believe that the jury award was excessive or that prejudgment interest would provide an inappropriate windfall to the Plaintiff.

B. Rate of Interest

The Zuchel case implies that federal, not state law, should apply in determining the rate of prejudgment interest to be used in cases arising under 42 U.S.C. § 1983. Similarly, the Tenth Circuit in U.S. Industries, looked to federal law in evaluating prejudgment interest with respect to federal securities laws and to state law to assess its availability for state law claims. This litigation was purely a trial on issues pertaining to the United States Constitution. Thus, it is reasonable to look to federal sources, such as the federal statute set forth at 28 U.S.C. § 1961, for the appropriate rate of interest. All parties agree that this statute is available to the Court as a rate to be considered in determining the appropriate rate of interest.

In this case, there is no reason to allow a higher rate for purposes of prejudgment interest than for post-judgment interest. The statutory rate is a reasonable and predictable basis for calculating prejudgment interest. See Rao v. New York City Health and Hospitals Corp., No. 89 CIV.2700, 1995 WL 168997 (S.D.N.Y. April 10, 1995). Plaintiff hopes the Court will use the higher state rate as set forth at 12 O.S. § 727 for 1995 judgments. However, the United States treasury bill rate referred to in 28 U.S.C. § 1961 adequately ensures that the Plaintiff is sufficiently, but not overly, compensated. Under § 1961, the interest is compounded annually. 28 U.S.C. § 1961(b). This Court determines that Plaintiff should receive prejudgment interest at the average rate over the period for which the interest is to be provided. By using the average rate, the Plaintiff receives the

amount he could have obtained on a relatively safe investment over the relevant period of time. McIntosh v. Irving Trust, 873 F. Supp. 872, 882-883 (S.D.N.Y. 1995). Thus, the rate should be the average rate, as calculated according to 28 U.S.C. § 1961, from the date the Complaint was filed, November 19, 1993, through the date of the judgment entered in this case.

V. Conclusion

For the reasons discussed above, Defendants' Motion for Judgment Notwithstanding the Verdict or, in the Alternative, for New Trial is denied. Also, Plaintiff's Motion for Judgment as a Matter of Law as to Individual Liability Motion for New Trial on Punitive Damages is denied. Plaintiff's Motion for Prejudgment Interest is granted and should be awarded in a manner consistent with this Order.

ORDERED this 28 day of APRIL, 1995.

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MICHAEL EBEL,

Plaintiff,

vs.

DEWEY JOHNSON, et al.,

Defendants.

No. 93-C-1036-K

JUDGMENT

This action came on for consideration before the Court, Honorable Terry C. Kern, District Judge, presiding, and the issue having been duly rendered,

IT IS THEREFORE ORDERED that the Plaintiff Michael Ebel recover from the Defendants in their official capacities the sum of $187,503.27, with post-judgment interest thereon at the rate of 7.34 percent as provided by law and prejudgment interest at the rate provided for by Order of this Court on April 28, 1995.

ORDERED this 28 day of April, 1995.

TERRY C. KERN
UNITED STATES DISTRICT JUDGE